Supreme Court, U.S.
FILED
04 257 AUG 23 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROBERT MOTTL,

Petitioner,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION,
HONORABLE STEPHEN N. LIMBAUGH, JR.,
HONORABLE DUANE BENTON,
HONORABLE WILLIAM RAY PRICE, JR.,
HONORABLE RONNIE L. WHITE,
HONORABLE MICHAEL A. WOLFF,
HONORABLE LAURA DENVIR STITH AND
HONORABLE RICHARD B. TEITELMAN,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

CHARLES R. WATKINS
JOHN R. WYLIE
Two First National Plaza,
Suite 600
Chicago, Illinois 60603
(312) 346-3466

MARK D. MITTLEMAN *
222 South Central Avenue,
Suite 900
St. Louis, Missouri 63105
(314) 863-8484

* Counsel of Record for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Missouri's Interest on Lawyer Trust Accounts ("IOLTA") program differs from the IOLTA program in the State of Washington which this Court approved in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), in that Missouri lawyers are required to deposit all nominal or short-term funds of their clients into IOLTA accounts, whether or not those funds might earn interest elsewhere. Lawyers must choose once a year whether or not to participate in the program for the remainder of that year. This case presents the following question:

Whether Missouri's program is immune from challenge as a taking of property for public use without just compensation, on the theory that it involves no "state action" because (1) the state allows lawyers voluntarily to opt out of participation in the otherwise mandatory IOLTA program on an annual basis and (2) the lawyers' private decisions to participate, entwined with the otherwise actionable taking of property by state actors, "destroy state action" even with regard to taking claims solely against those state actors.

LIST OF PARTIES

The Petitioner, Robert Mottl, appears by Mark D. Mittleman, 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105, Counsel of Record, and by the following additional counsel: Robert M. Heggie and the law firm of Beach, Stewart, Heggie, Mittleman & Curtis, L.L.C., 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105; and Charles R. Watkins, John R. Wylie and the law firm of Susman & Watkins, Two First National Plaza, Suite 600, Chicago, Illinois 60603.

The Respondent, Missouri Lawyer Trust Account Foundation, appears by Charles A. Weiss, John W. Rogers, Jennifer M. Kingston and the law firm of Bryan Cave LLP, One Metropolitan Square, Suite 3600, 211 North Broadway, St. Louis, Missouri 63102.

The Respondents, Honorable Stephen N. Limbaugh, Honorable Duane Benton, Honorable William Ray Price Jr., Honorable Ronnie L. White, Honorable Michael A. Wolff, Honorable Laura Denvir Stith and Honorable Richard B. Teitelman, the Judges of the Supreme Court of Missouri, in their official capacity, appear by Jeremiah W. (Jay) Nixon, Attorney General of Missouri, Karen King Mitchell, Deputy Attorney General, Paul R. Maguffee and Dustin J. Allison, Assistant Attorneys General, P. O. Box 899, Jefferson City, Missouri 65102. Judge Benton resigned from the Supreme Court of Missouri effective July 8, 2004. His successor has not yet been selected.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
1. The Supreme Court of Missouri's ethical rule constitutes state action. Its Interest on Lawyer Trust Accounts ("IOLTA") program is not immune from challenge as a taking of property for public use without just compensation, because it does involve "state action," notwithstanding its provisions allowing lawyers voluntarily to opt out of participation in the otherwise mandatory IOLTA program on an annual basis; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003)	10

TABLE OF CONTENTS—Continued

Page

2. Private decisions entwined with the otherwise actionable taking of property by state actors do not "destroy state action" for purposes of claims against those state actors; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington* and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), as well as decisions of United States Courts of Appeals, including *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993)..... 14

3. Missouri's taking of the net interest earned on clients' funds is compensable, notwithstanding their lawyers' prior failure to opt out of the IOLTA program, because the rule governing the program at least permits and arguably requires those lawyers who participate in the program to make deposits of funds which can earn net interest for the clients, and thereby differs materially from the Washington state rule at issue in *Brown v. Legal Foundation of Washington*..... 17

CONCLUSION..... 22

APPENDIX A

Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al., 133 S.W.3d 142 (Mo.App.W.D. 2004)..... 1a

TABLE OF CONTENTS—Continued

APPENDIX B Page

Order and Judgment in *Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al.*, Case No. 02CV326315 (Circuit Court of Cole County, Missouri, Division II, April 18, 2003) 10a

APPENDIX C

Order of the Missouri Court of Appeals, Western District, April 27, 2004 ..... 16a

APPENDIX D

Order of the Supreme Court of Missouri, May 25, 2004 ..... 17a

APPENDIX E

Missouri Rule of Professional Conduct 4-1.15 ..... 18a

APPENDIX F

Class Action Petition filed in the Circuit Court of Cole County, Missouri 22a

APPENDIX G

Motion of Defendant Missouri Lawyer Trust Account Foundation to Dismiss, filed in the Circuit Court of Cole County, Missouri 37a

APPENDIX H

Motion of Defendants Limbaugh, Benton, Price, Wolff, White, Stith and Teitelman to Dismiss or, in the Alternative, to Join Indispensable Party and Disqualify Opposing Counsel, filed in the Circuit Court of Cole County, Missouri 42a

TABLE OF CONTENTS—Continued

APPENDIX I Page

"Points Relied On" excerpted from Petitioner's Statement, Brief and Argument in the Missouri Court of Appeals, Western District 47a

APPENDIX J

Motion for Rehearing, or in the Alternative, Application for Transfer to the Supreme Court of Missouri, filed in the Missouri Court of Appeals, Western District 49a

APPENDIX K

Application for Transfer, filed in the Supreme Court of Missouri 64a

TABLE OF AUTHORITIES

CASES — Page

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)..... 13, 14
Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).....13, 14-15
Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S.Ct.1406, 155 L.Ed.2d 376 (2003)..... *passim*
Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)..... 13, 14
Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993)..... 14, 15
Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)..... 13, 14
Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) ... 15-16
Fries v. Barnes, 618 F.2d 988 (2d Cir. 1980)..... 15
Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)..... 13, 14
Mottl v. Missouri Lawyer Trust Account Foundation, 133 S.W.3d 142 (Mo.App.W.D. 2004) 1, 2, 8-9
The Tool Box v. Ogden City Corporation, 316 F.3d 1167 (10th Cir. 2003), *vacated on other grounds* 355 F.3d 1236 (10th Cir. 2004)..... 15
United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)..... 13, 14
West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)..... 13, 14

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V ... 2, 3, 4, 6
Constitution of the United States, Amendment XIV 2, 3, 4, 6

TABLE OF AUTHORITIES—Continued

UNITED STATES STATUTES	Page
28 U.S.C. § 1257(a)	2
42 U.S.C. § 1983	2, 3, 4, 6, 16
UNITED STATES SUPREME COURT RULES	
United States Supreme Court Rule 10(b)	14
United States Supreme Court Rule 10(c)	14
MISSOURI CONSTITUTIONAL PROVISIONS	
Constitution of Missouri, Article V, Section 3	8
MISSOURI STATUTES	
Section 477.070, R.S.Mo.	8
MISSOURI SUPREME COURT RULES	
Missouri Rule of Professional Conduct 4-1.15	*passim*
Missouri Rule of Civil Procedure 52.04	7
Missouri Rule of Civil Procedure 55.27(a)(6)	6, 7
Missouri Rule of Civil Procedure 55.27(a)(7)	7
OTHER AUTHORITIES	
United States Internal Revenue Service Rev. Rul. 81-209, 1981-2 C.B. 16	12
Florida Bar Rule 5-1.1	18, 19
Illinois Rule of Professional Conduct 1.15	18, 19
Indiana Rule of Professional Conduct 1.15	18, 19, 20
Texas State Bar Rules, Art. X § 9	18
Texas State Bar Rules, Rule of Professional Conduct 1.14	18
Texas Equal Access to Justice Program, Article XI §§ 1-9	18, 19, 20
Virginia Integration of the State Bar Rules, Va.R.S.Ct., Pt. 6 § 2	18
Virginia Integration of the State Bar Rules, Va.R.S.Ct., Pt. 6 § 4, ¶ 20	18

TABLE OF AUTHORITIES—Continued

	Page
Virginia Rule of Professional Conduct 1.15.....	18
Washington Rule of Professional Conduct 1.14....	17, 21
IOLTA Adoption Order, 102 Wash.2d 1101 (1984).....	20-21
W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990).....	12

IN THE

Supreme Court of the United States

No. ___

ROBERT MOTTL,

Petitioner,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION,
HONORABLE STEPHEN N. LIMBAUGH, JR.,
HONORABLE DUANE BENTON,
HONORABLE WILLIAM RAY PRICE, JR.,
HONORABLE RONNIE L. WHITE,
HONORABLE MICHAEL A. WOLFF,
HONORABLE LAURA DENVIR STITH AND
HONORABLE RICHARD B. TEITELMAN,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

Robert Mottl, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled *Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al.*, 133 S.W.3d 142 (Mo.App.W.D. 2004).

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, in the case styled *Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al.*, 133 S.W.3d 142 (Mo.

App.W.D. 2004), may be found in the Appendix to this Petition, Appendix A, at pages 1a-9a.

JURISDICTION

Petitioner Robert Mottl commenced a civil action in the Missouri state courts, alleging that Respondents took his property for public use without just compensation pursuant to the Interest on Lawyer Trust Accounts (IOLTA) program created by the Missouri Supreme Court's Rule of Professional Conduct 4-1.15 (Appendix E, pages 18a-21a), and seeking damages and equitable relief under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983. (Appendix F, pages 22a-36a.) The Circuit Court of Cole County, Missouri, dismissed the action with prejudice, on motions filed by the Respondents (Appendix G, pages 37a-41a; Appendix H, pages 42a-46a), for failure to state a claim upon which relief can be granted. (Appendix B, pages 10a-15a.) Petitioner timely appealed the dismissal to the Missouri Court of Appeals, Western District, which on March 23, 2004, issued an opinion, 133 S.W.3d 142 (Appendix A, pages 1a-9a), affirming the judgment of the Circuit Court. Petitioner then timely filed in that Court of Appeals a Motion for Rehearing, or in the Alternative, Application for Transfer to the Supreme Court of Missouri (Appendix J, pages 49a-63a), which the Court of Appeals denied on April 27, 2004 (Appendix C, page 16a). Petitioner then timely filed an Application for Transfer to the Supreme Court of Missouri (Appendix K, pages 64a-75a), which the Supreme Court of Missouri denied on May 25, 2004 (Appendix D, page 17a). The Missouri Court of Appeals, Western District, was therefore the highest state court in which a decision could be had in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States: the Fifth Amendment, which provides, in pertinent part:

> ". . . nor shall private property be taken for public use without just compensation";

and the Fourteenth Amendment, Section 1, which provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws";

and the following provision of the United States Code: 42 U.S.C. § 1983, which provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable";

and the following rule of the State of Missouri, promulgated by the Supreme Court of Missouri: Missouri Rule of Professional Conduct 4-1.15, set out in the Appendix to this Petition as Appendix E, pages 18a-21a.

STATEMENT OF THE CASE

Petitioner Robert Mottl originally filed this civil action in the Circuit Court of Cole County, Missouri, on behalf of himself and a class of similarly situated persons. Petitioner alleged that Respondents took his and the class's property for public use without just compensation, pursuant to the Interest on Lawyers' Trust Accounts ("IOLTA") program established under Missouri Rule of Professional Conduct 4-1.15(d) (the "Rule") regulating the state's bar. His pleading was in two counts, under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 respectively, seeking both damages to compensate him and the class, and prospective equitable relief against unconstitutional application and enforcement of the Rule. (Appendix F, pages 22a-36a.) He contended that material differences between the Rule in Missouri and the Washington state rule involved in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), justified the relief he sought. The Circuit Court of Cole County dismissed Petitioner's action with prejudice (Appendix B, pages 10a-15a) on the Respondents' motions to dismiss (Appendix G, pages 37a-41a; Appendix H, pages 42a-46a), for failure to state a claim upon which relief can be granted, without hearing or determining the issue of class certification. The Missouri Court of Appeals, Western District, affirmed the Circuit Court's judgment, solely on the ground that the required element of "state action" for Petitioner's claims under federal law was absent from the case. (Appendix A, pages 1a-9a.) The Supreme Court of Missouri denied Petitioner's application for transfer of the appeal. (Appendix D, page 17a.)

The Supreme Court of Missouri's Rule of Professional Conduct 4-1.15(d) requires Missouri lawyers to deposit all funds of their clients which "are nominal in amount or are expected to be held for a short period of time" into a pooled interest-bearing trust account established with a bank or

savings and loan association, with the Respondent Missouri Lawyer Trust Account Foundation (the "Foundation") designated as the income beneficiary. Each participating lawyer or law firm directs the depository institution to remit the net interest or dividends computed on the average monthly balance of the account, or as otherwise computed in accordance with the institution's standard accounting practice, directly to the Foundation. The Foundation, a not for profit Missouri corporation, is the beneficiary and administrator of the state's IOLTA program, which allows interest to be earned on such nominal or short-term client deposits held in lawyers' pooled trust accounts and paid to the Foundation. The Foundation then distributes the income to various legal aid agencies and programs for the administration of justice and for civil legal services to low-income individuals and families, in an amount exceeding $5,000,000 since 1998. (Appendix E, pages 18a-21a; Appendix F, pages 27a-29a.)

On November 3, 1999, Robert M. Heggie, a Missouri lawyer, deposited $3,600.00 of the funds of Petitioner Robert Mottl, his client, into an IOLTA account at Mercantile Bank N.A. in St. Louis, where Heggie held all or part of such funds continuously from November 3, 1999 to November 8, 1999. The funds were the proceeds from a settlement of certain claims of Petitioner for damages arising out of personal injuries, in connection with which Heggie and Allan F. Stewart had represented him. The funds were to be allocated in part to Heggie and Stewart, for payment of their attorneys' fees and reimbursement of the expenses they had advanced in connection with the prosecution of the claims, with the remainder to be paid out to Petitioner. Heggie made the deposit after determining that the $3,600.00 of Petitioner's funds were nominal or short-term in nature, and thereafter he left the funds in the IOLTA account on behalf of Petitioner from November 3, 1999 to November 8, 1999, before distributing them as contemplated by his agreements with Petitioner. Petitioner did not desire to have his funds

deposited into or retained in the IOLTA account pending their distribution. The Foundation collected all the interest from the pooled IOLTA account into which the funds had been deposited. The Foundation has not returned the interest gained on Petitioner's funds in the IOLTA account nor compensated Petitioner for the use of his funds. (Appendix F, pages 29a-30a.)

Petitioner filed this two-count action in the Circuit Court of Cole County, Missouri, a state trial court of general jurisdiction, on December 19, 2002, alleging that, pursuant to the Rule and the IOLTA program, the Respondents (the Foundation and the members of the Supreme Court of Missouri, named as parties in their official capacity) unconstitutionally took his and the class's property for public use without just compensation. Count I premised those claims on the Fifth and Fourteenth Amendments to the Constitution of the United States; Count II raised them under 42 U.S.C. § 1983. In each Count, Petitioner sought both compensatory damages for the taking of his and the class's property, and prospective equitable relief. (Appendix F, pages 22a-36a.)

On February 14, 2003, the Foundation moved, pursuant to Missouri Rule of Civil Procedure 55.27(a)(6), to dismiss the action on the grounds that it failed to state a claim upon which relief can be granted. The Foundation contended in its motion that participation in the IOLTA program "is neither coerced nor compelled by the State, but rather merely authorized, or at most encouraged", and that "Because the State does not compel the attorney or client to place client funds in an IOLTA account under Rule 4-1.15 and such action is a voluntary choice of the attorney and client, there is no state action and no violation of the Takings Clause." (Appendix G, pages 37a-41a.) On the same day, February 14, 2003, the Attorney General of Missouri, on behalf of the members of the state Supreme Court ("the Supreme Court Respondents"), filed their "Motion to Dismiss or, in the

Alternative, to Join Indispensable Party and Disqualify Opposing Counsel." This motion similarly contended that the Petition should be dismissed pursuant to Rule 55.27(a)(6) because "as a matter of law, there was no state action involved in the placement of Plaintiff's funds--or those of any other client--into an IOLTA account." It also asserted that the Supreme Court Respondents were entitled to legislative immunity for promulgating the Rule, and that if the court were to find state action at all, the only person who could be viewed as a "state actor" responsible for placing Appellant's funds into an IOLTA account was his own lawyer, Heggie, "without being mandated by any other defendant to do so", thereby making Heggie an "indispensable party" who under Missouri Rules of Civil Procedure 52.04 and 55.27(a)(7) would have to be joined as a defendant and then disqualified as Petitioner's counsel. (Appendix H, pages 42a-46a.)

Petitioner has never conceded either that his lawyer's participation in the IOLTA program at the time of the deposit was voluntary, or that the actual deposit of his funds into an IOLTA account was either voluntary or improper as a matter of state law, but rather has maintained that Missouri's Rule instructed (and arguably even compelled) his lawyer to make the deposit. (*See* Appendix F, pages 23a, 27a, 32a; Appendix I, pages 47a-48a.)

On April 18, 2003, the Circuit Court dismissed the Petition with prejudice for failure to state a claim upon which relief can be granted, without hearing or determining the issue of class certification. (Appendix B, pages 10a-15a.) The Circuit Court's Order and Judgment stated that the holding of *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), applied to Petitioner's claims and required a finding that there was no taking of Petitioner's property without just compensation, because "the aspect of Washington's Rule that the Supreme Court focused on in *Brown* is indistinguishable from Missouri's Rule 4-1.15," forbidding the deposit of funds into

an IOLTA account if they could earn net interest for a client. (Appendix B, page 13a.) In addition, the Order and Judgment stated that participation in the IOLTA program is voluntary for Missouri lawyers, and that even lawyers who participate in it voluntarily act "contrary to the provisions" of the Rule if they deposit client funds capable of earning net interest, so that any loss of such net interest would not be "attributable ... to any state action" and Petitioner "cannot satisfy the state action requirement." (Appendix B, pages 14a-15a.)

The Circuit Court overruled Petitioner's Motion for Reconsideration and Amendment of its ruling on July 28, 2003, and Petitioner timely filed a direct appeal to the Missouri Court of Appeals, Western District, the appropriate court for such an appeal pursuant to Article V, Section 3 of the Constitution of Missouri and Section 477.070, R.S.Mo. Petitioner contended that the Circuit Court had erred in dismissing the action outright for failure to state a claim upon which relief can be granted. He argued, on the key issues of the appeal, that the Respondents' confiscation of the net earnings on client funds deposited into lawyers' IOLTA trust accounts pursuant to the Rule was indeed a taking of private property without just compensation, in that it was legally error for the Circuit Court (A) to conclude that funds which could have earned net interest for clients could not have been properly deposited into those IOLTA accounts, and (B) to hold that any such deposits by lawyers were both voluntary and improper, so that they would wholly negate the Respondents' role, as state actors, in taking such interest earnings for public use. (*See* Appendix I, pages 47a-48a.)

On March 26, 2004, that Court of Appeals affirmed the judgment of the Circuit Court. (Appendix A, pages 1a-9a.) The Court of Appeals's opinion stated that "Because the issue of state action is dispositive in this case, Mr. Mottl's first

point is not addressed." It held, 133 S.W.3d at 146-148 (Appendix A, pages 6a-7a, 8a-9a):

> "State action requires both action taken pursuant to state law and significant state involvement. . . . While the deposit of Mr. Mottl's funds into an IOLTA account and the transfer of interest earned on the account to the Foundation were authorized by Rule 4-1.15, thus satisfying the first requirement of the state action test, the inquiry does not end there. Rather, Mr. Mottl must also satisfy the second requirement, whether the allegedly unconstitutional conduct is fairly attributable to the State. . . .
>
> Unlike the Washington IOLTA program analyzed in *Brown*, which mandates participation, Missouri's program is voluntary. . . . Thus, the acts of depositing client funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation are not attributable to the State.
>
> *Brown* reinforces this holding. The Supreme Court noted that lawyers might mistakenly deposit client funds into an IOLTA account even though they could have generated net income for the client. . . . Doing so, however, would be contrary to the Washington Supreme Court rule, and '[a]ny conceivable net loss . . . was the consequence of . . . incorrect private decisions rather than any state action.' . . . This reasoning supports the decision in this case that private decisions to deposit client funds into a Missouri IOLTA account destroy state action."

The Supreme Court of Missouri denied further review (Appendix D, page 17a), although in each of his post-opinion pleadings Petitioner raised essentially the same question which is presented by this Petition for Writ of Certiorari in regard to the holding of the Court of Appeals. (Appendix J, pages 49a-63a; Appendix K, pages 64a-75a.)

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Missouri's ethical rule constitutes state action. Its Interest on Lawyer Trust Accounts ("IOLTA") program is not immune from challenge as a taking of property for public use without just compensation, because it does involve state action, notwithstanding its provisions allowing lawyers voluntarily to opt out of participation in the otherwise mandatory IOLTA program on an annual basis; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

The Missouri Court of Appeals chose to decide this case solely on an erroneous federal ground, without even addressing the key intertwined issue of state and federal law presented to it: whether the Rule in Missouri is or is not materially different from the Washington state rule at issue in *Brown v. Legal Foundation of Washington.* A reasonable interpretation of the Missouri Rule would demonstrate major differences from Washington's rule, entitling Petitioner to prevail on the merits of his taking and just compensation claims. But the ground on which the court below relied is itself unreasonable, in conflict with the relevant federal law of "state action"--including that implicit in this Court's opinion in *Brown*--and insufficient to avoid a decision on the merits of the taking and compensation issues here.

The issue on which the Missouri Court of Appeals decided the case is not even a real issue, given this Court's decision in the *Brown* case, on which Petitioner's claims are directly founded. This Court characterized the issues which it decided in *Brown* as follows (538 U.S. at 220):

> "In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, . . . (1998), a case involving the Texas IOLTA program, we held 'that the interest income generated by

> funds held in IOLTA accounts is the "private property" of the owner of the principal.' *Id.*, at 172, ... We did not, however, express any opinion on the question whether the income had been 'taken' by the State or 'as to the amount of "just compensation," if any, due respondents.' *Ibid.* We now confront those questions."

On the first of those two questions, this Court held that the income ***was in fact taken by the State*** of Washington, and was a "*per se*" taking of the funds by the State, rather than a "regulatory taking." However, the majority opinion then found that, under the particular features of the Washington rule, no "just compensation" was due to the plaintiffs or anyone else, because they sustained no "net loss" from the taking. No clients in the state of Washington could sustain such a loss because, as the majority found, "The Rules adopted and administered by the Washington Supreme Court ***unambiguously require*** lawyers and LPOs to deposit client funds in ***non-IOLTA accounts whenever*** those funds could generate net earnings for the client." (538 U.S. at 239 [emphasis added].)

But there could have been no "taking" by the State of Washington within the meaning of the Fifth and Fourteenth Amendments without "state action." The very idea of a state "taking" which is not "state action" is an oxymoron. There would also have been no constitutional question of "just compensation" to review, but for the fact that compensation was denied by the State and not merely by a private party. *Id.* at 234-235; *id.* at 242 and 251 n. 7 (Scalia, J., dissenting). The Court could never even have reached the taking and compensation issues in *Brown* if no state action were involved; it would have lacked a prerequisite to decide the merits of those issues.

There is *dictum* in *Brown*, 538 U.S. at 239, which suggests that any loss suffered by the Washington plaintiffs was caused by their lawyers' private decision not to comply with

the clear requirements of the Washington rule. That is, if interest could be earned in a non-IOLTA trust account, the Washington lawyer must avail himself of that opportunity and not use the IOLTA account. Washington had specifically designed its rule to prevent any net loss to the client. The application of this *dictum* to the Missouri Rule would not be possible without first deciding the question that the Missouri Court of Appeals expressly declined to decide: whether Missouri's Rule is materially different from Washington's, as Petitioner contended, or (as Respondents had argued and the Circuit Court of Cole County had erroneously opined) is "indistinguishable" from it.

The purportedly "voluntary" aspects of the Rule, on which the Missouri Court of Appeals based its conclusion that state action was absent, are neither obvious nor unambiguous. They provide little guidance and little freedom of action to the lawyers who must comply with the Rule, and virtually none to clients.[1] But, more importantly, even to the extent that they exist at all, they still do not eliminate or negate the role of the state and its officials who take and use the interest

---

[1] The IOLTA program is not actually voluntary. As the former president of the Respondent Foundation wrote when the Rule was amended to its present form, "The amendment changed our IOLTA program from a purely voluntary plan to an 'opt-out' plan." W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990). Moreover, the only option lawyers have to except themselves from participation in the program must be exercised on an annual basis, by notice in writing before January 31, after which the option becomes unavailable until the following year; and the Rule is anything but clear in identifying this option to the members of the bar, first making it appear that participation is mandatory for all lawyers who are not "exempt," and only later disclosing the option through a maze of cross-references. Rule 4-1.15(d), (e)(4) and (f), Appendix E, pages 18a-21a. Participation is completely involuntary for the lawyers' clients, because the controlling Internal Revenue Service ruling, Rev. Rul. 81-209, 1981-2 C.B. 16, makes IOLTA earnings non-taxable only where the clients have no choice regarding the deposit of their funds into IOLTA accounts.

earned on client funds once those funds are placed into IOLTA accounts. Respondents' taking and use of the funds, as contemplated and authorized by the Rule, supplies all the "state action" required to support Petitioner's claims. No authority, and certainly not the cases cited by the court below, supports a contrary conclusion. A long, familiar line of decisions by this Court shows instead that voluntary private acts, combined or entwined with state officials' acts, ***are*** remediable as state action.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *United States v. Price*, 383 U.S. 787 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *West v. Atkins*, 487 U.S. 42 (1988); and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), are all inconsistent with the Missouri courts' analysis. To uphold the Court of Appeals's decision on the merits would require this Court not only to re-examine, but to overrule those precedents.

The opinion below attempted to avoid finding the state action which is clearly present in this case, and thereby to save Missouri's Rule, by mischaracterizing Petitioner's claims. It argued that "The acts of which Mr. Mottl complains, of [*sic*] which he contends constitutes a taking of his personal property without just compensation, are the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation." (Appendix A, page 7a.) That statement is untrue both as a matter of fact and law. Nowhere in Petitioner's pleading did he complain of the acts of his own attorney, who was not even a party in the case. Legally, it would have made no sense for Petitioner to complain of the acts of the attorney in an action brought, instead, against the state actors who are Respondents. *Brown*, *supra*, 538 U.S. at 234-235, and at 251 n. 7 (Scalia, J., dissenting). It would

have made even less sense for Petitioner to complain against the attorney in an action like this one, the very premise of whose claims is the taking of Petitioner's property ***for public use without just compensation***. The Missouri Court of Appeals's mischaracterization of the issues which Petitioner had properly raised thus went far beyond a mere judicial error, such as an incorrect factual finding or a misapplication of a properly stated rule of law, or an adequate state ground on which certiorari might be denied. It was a challenge to more than forty years of settled constitutional law in the federal courts, to protect an indefensible Rule and conduct by the State of Missouri and its judicial system; and, as such, it must not go unreviewed.

2. Private decisions entwined with the otherwise actionable taking of property by state actors do not "destroy state action" for purposes of claims against those state actors; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington* and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), as well as decisions of United States Courts of Appeals, including *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993).

This case fulfills the standard for a grant of certiorari under this Court's Rule 10(b) as well as Rule 10(c). The state court of last resort has decided an important federal question in a manner that conflicts not only with the relevant decisions of this Court—including all those cited above: *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *United States v. Price*, 383 U.S. 787 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *West v. Atkins*, 487 U.S. 42 (1988); and *Brentwood*

Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001)—but also with the decisions of at least one United States Court of Appeals. *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), states the established law on that federal question as follows [emphasis added]:

> "A private individual may be subject to liability under this section if he or she willfully collaborated with an official state actor in the deprivation of the federal right. *See* [*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)] at 152 . . . ('"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."' (quoting *United States v. Price*, 383 U.S. 787, 794 . . . (1966)). ***Conversely, a state actor may be subject to liability for an action physically undertaken by private actors in violation of the plaintiff's liberty or property rights if the state actor directed or aided and abetted the violation.*** *See, e.g., Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980)."

Fries v. Barnes, *supra*, states that a "government agent may not escape responsibility by claiming that the violation of the plaintiff's rights was committed by the private person involved in such a collaborative undertaking." In *The Tool Box v. Ogden City Corporation*, 316 F.3d 1167, at 1177 (10th Cir. 2003), *vacated on other grounds* 355 F.3d 1236 (10th Cir. 2004), the Tenth Circuit cited the "entwinement" principle of *Brentwood Academy*, *supra*, in holding that the actions of a single private party, a member of the "Review Board" enforcing the restrictive covenants of a municipally owned industrial park, cannot "transform" that otherwise public agency "into a private actor", which "would be to turn a blind eye to structural realities".

The Third Circuit's opinion in *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980), an action challenging the constitutionality of Pennsylvania's postjudgment garnishment statutes on due process and supremacy clause grounds, is also

irreconcilable with the Missouri Court of Appeals's theory that private conduct can "destroy state action," even if the named defendant state actors' role is only ministerial. Both the majority, which held the Pennsylvania statute unconstitutional, and the dissenting opinion in *Finberg* agreed that the plaintiff's complaint against the prothonotary and sheriff who respectively issued a writ of execution and served it on a garnishee, at the behest of a private judgment creditor, had "named defendants who meet the prerequisites to adjudication in a federal court." *Id.* at 53-54. As stated in the dissenting opinion, *id.* at 65, "The appellees before us wear the appropriate public costumes to furnish a modicum of state action, thereby becoming the vehicle by which an ordinary dispute between a debtor and creditor has been transmogrified into a federal case by virtue of 42 U.S.C. § 1983." The majority opinion held, *id.* at 54:

> "In Ex Parte Young, 209 U.S. 123, 157, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908), the seminal decision on suits to restrain the enforcement of laws alleged to be unconstitutional, the Supreme Court held that a particular official was properly named as a defendant if the official 'by virtue of his office has some connection with the enforcement of the act.' ... This conclusion is not altered by the fact that the duties of the prothonotary and the sheriff are entirely ministerial. Under Ex Parte Young the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights. We note that courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws."

The mere fact that Petitioner's private attorney was the person who deposited Petitioner's funds into an IOLTA account subject to Missouri's Rule—"voluntarily" or otherwise—does not "destroy" the state action of Respondents in taking his property from that account for public use with-

out just compensation. The decisions of federal Courts of Appeals, as well as this Court, conflict with the clearly incorrect and unprecedented holding on that point by the state court of last resort here, justifying the grant of a writ of certiorari to review the Missouri decision.

3. Missouri's taking of the net interest earned on clients' funds is compensable, notwithstanding their lawyers' prior failure to opt out of the IOLTA program, because the rule governing the program at least permits and arguably requires those lawyers who participate in the program to make deposits of funds which can earn net interest for the clients, and thereby differs materially from the Washington state rule at issue in *Brown v. Legal Foundation of Washington*.

Brown was not the last IOLTA case this Court will have to address. As the four dissenting Justices noted at the time, there are contradictions in the *Brown* majority's theory that the Washington plaintiffs had suffered no net loss, which will necessarily affect future cases in the lower courts. *Id.* at 538 U.S. 244 (Scalia, J., dissenting). Moreover, as Justice Kennedy noted in *Brown*, IOLTA programs raise First Amendment issues which "may have to come before the Court in due course." *Id.* at 538 U.S. 253 (Kennedy, J., dissenting). While the present case does not raise First Amendment issues, it definitely requires the Court to revisit the issue of the net loss to Petitioner under Missouri's Rule.

The fundamental issue Petitioner raised in this case, but the Missouri Court of Appeals attempted to avoid, is whether the Missouri Rule is materially different from—or identical to—the Washington rule, Washington Rule of Professional Conduct 1.14, which this Court upheld in *Brown*. Petitioner's position is that Missouri's Rule is not only facially, textually different from Washington's rule, as should be obvious from

a comparison of their literal terms, but is legally and materially different in the key respects which should determine the outcome of this case. Unlike the "categorical requirement" of the Washington rule, which absolutely and "unambiguously" requires lawyers to deposit their clients' funds into non-IOLTA accounts, and forbids them to deposit those funds into IOLTA accounts, "whenever those funds could generate net earnings for the client" (*id.* at 538 U.S. 239), Missouri's Rule *compels* the deposit of such funds into IOLTA accounts. On the logic of *Brown* itself, the application of the Rule has thus caused the unconstitutional taking of Petitioner's property without just compensation. Petitioner has stated a claim upon which relief can be granted, and the Missouri courts' judgments to the contrary should be reversed.

In fact, the various states' IOLTA programs differ in a variety of ways, and many of them, including Missouri, do not have the specific features of Washington's program which this Court had relied upon to find that the *Brown* plaintiffs suffered no compensable net loss from the taking of their property. The Florida, Indiana, Illinois, Texas and Virginia rules, for example, are identical neither to Washington's nor Missouri's, nor to each other. *See* Florida Bar Rule 5-1.1; Illinois Rule of Professional Conduct 1.15; Indiana Rule of Professional Conduct 1.15; Texas State Bar Rules, Art. X § 9, Rule of Professional Conduct 1.14, and Texas Equal Access to Justice Program, Article XI §§ 1-9; Virginia Integration of the State Bar Rules, Va.R.S.Ct., Pt. 6 § 2, Rule of Professional Conduct 1.15, and Va.R.S.Ct., Pt. 6 § 4, ¶ 20.

Some state IOLTA programs are mandatory in whole or in part, as applied to the lawyers governed by their rules, while others are voluntary. State IOLTA rules typically require the deposit of "nominal or short-term" funds of clients into IOLTA accounts, but they differ in their description of what

such funds are.[2] They also differ in their specific provisions for the consequences of mistakenly depositing client funds which are not "nominal or short-term," and do not necessarily conform to the Washington rule discussed in *Brown*, *supra*, that lawyers would incur personal liability for doing so.[3]

---

[2] Of the seven states' rules cited here, only Florida's actually contains an express definition of the term: "'nominal or short term' describes funds of a client or third person that, pursuant to subdivision (3) below, the lawyer has determined cannot practicably be invested for the benefit of the client or third person". Florida Bar Rule 5-1.1(g)(1)(A). Illinois, Indiana, Texas and Washington all use "nominal or short-term" or similar language in their IOLTA rules (Virginia does not), but none of them directly defines it. Indiana sets out a list of "factors" which lawyers "shall take into consideration" in the exercise of good faith judgment "in determining whether funds of a client are of such nominal amount or are expected to be held for a short period of time". Indiana Rule of Professional Conduct 1.15(h). Illinois's rule lists a similar group of "factors" to Indiana's, but refers to them as the factors that lawyers "shall take into consideration" in determining "the type of account into which to deposit particular funds of a client," under Illinois Rule of Professional Conduct 1.15(e).

[3] Illinois states only that a lawyer's "decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer." Illinois Rule of Professional Conduct 1.15(d)(5). Texas lists no specific factors to determine if funds are "nominal in amount" or "reasonably anticipated to be held for a 'short period of time,'" but states that lawyers are "not liable in determining which funds are nominal in amount or on deposit for a short period of time if the determination is made in good faith in accordance with the rules." Texas State Bar Rules, Art. XI § 7. Florida and Illinois, like Texas, have inserted provisions into their state IOLTA rules which immunize lawyers from both civil liability to their clients, and professional disciplinary action, for any mistaken decisions in depositing the clients' funds into IOLTA rather than non-IOLTA accounts; the Illinois immunity rule appears to go even further than those of Florida and Texas, by omitting any reference to a requirement of good faith. Florida Bar Rule 5-1-1(g)(3)(E); Illinois Rule of Professional Conduct 1.15(d)(5); Texas State Bar Rules, Art. XI § 7. Virginia and Washington provide no such immunity.

Some even recognize that they pose a constitutional taking problem in those instances where lawyers make deposits of client funds that could earn net interest into IOLTA accounts and therefore provide clients a compensation mechanism to deal with it.[4]

This Court's opinion in *Brown* could only save the Washington IOLTA program by delineating precisely those clear, specific features of the text of the Washington rule which made it legally ***impossible*** (and not simply unlikely) for clients to sustain a loss attributable to the state's *per se* taking of interest on their funds. But those features are not found in the IOLTA rules of other states, including Missouri. The *Brown* majority pointed to the declaration of the Supreme Court of Washington in its *IOLTA Adoption Order*, 102 Wash.2d 1101 (1984), that in the face of public criticism of the originally proposed rule, the court had felt the necessity to include such absolutely unambiguous language within the rule's text:

> "in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9-102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be

---

[4] Indiana, like Florida, Illinois and Texas, has an immunity provision for lawyers, Indiana Rule of Professional Conduct 1.15(h), but in contrast to Florida and Illinois, it actually provides a mechanism for clients to obtain from the Indiana Bar Foundation a refund of moneys wrongfully withheld from them by reason of their lawyers' mistaken decisions to deposit their funds into IOLTA accounts. Indiana Rule of Professional Conduct 1.15(d)(7). Texas's rules suggest that such a remedy may be available, although they do not expressly provide one. Texas State Bar Rules, Art. XI § 8.

> invested profitably for the benefit of clients. If they can, then investment for the client is mandatory."

Id. at 1113-1114 [emphasis in original], cited in *Brown*, *supra*, 538 U.S. at 227. Therefore, the majority in *Brown* added, "Given the court's explanation of its Rule, it seems apparent that a lawyer who mistakenly uses an IOLTA account as a depositary for money that could earn interest for the client would violate the Rule." *Id.* But the provisions of the Washington rule are strikingly different from Missouri's Rule, both in their unequivocal clarity and in their substance.

The Missouri Rule does ***not*** expressly order lawyers to make a choice for the deposit of their clients' funds, as between (1) an IOLTA account of the type established by the rule, and (2) one of two different, specifically described types of separate interest-bearing trust accounts, either for "(i) the particular client or client's matter on which the interest will be paid to the client; or (ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client." Nor, even more importantly, does it compel lawyers to make that choice based "only" on "whether the funds to be invested could be utilized to provide a positive net return to the client." *Compare* Washington Rule of Professional Conduct 1.14(c).

There is no unambiguous requirement in Missouri that funds be placed in a non-IOLTA account if they "could be utilized to provide a positive net return to the client." To the contrary, in fact, if lawyers have not certified under Rule 4-1.15(e) by January 31 of any given year, together with their annual enrollment fee statement for that year, that they are "exempt" from participation in the IOLTA program, during that year Rule 4-1.15(d) will require that they must deposit "***all*** funds of clients that are nominal in amount or are expected to be held for a short period of time" into an IOLTA account. (Appendix E, page 18a; emphasis added.) Although

Rule 4-1.15(d)(2) states that "only" funds of clients that "are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients" may be deposited into the IOLTA account, the Rule fails to give an unambiguous definition--or, indeed, any definition--of funds that "are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients."

Therefore, this Court should grant the writ of certiorari to make clear that *Brown* did not automatically immunize all states' IOLTA programs, and should reverse the Missouri Court of Appeals's judgment because Respondents' application of the Missouri Rule has in fact taken Petitioner's property without just compensation, in violation of the constitutional standard of *Brown*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES R. WATKINS
JOHN R. WYLIE
Two First National Plaza,
Suite 600
Chicago, Illinois 60603
(312) 346-3466

MARK D. MITTLEMAN *
222 South Central Avenue,
Suite 900
St. Louis, Missouri 63105
(314) 863-8484

* Counsel of Record for
Petitioner

APPENDIX A

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

[Filed March 23, 2004]

WD63130

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,

Appellant,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, ET AL.;
HON. STEPHEN N. LIMBAUGH, JR.;
HON. DUANE BENTON;
HON. WILLIAM RAY PRICE, JR.;
HON. RONNIE L. WHITE;
HON. MICHAEL A. WOLFF;
HON. LAURA DENVIR STITH; and
HON. RICHARD B. TEITELMAN,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Honorable Richard G. Callahan, Judge

Before: Ronald R. Holliger, P.J., Robert G. Ulrich and James M. Smart, *JJ.*

Robert Mottl appeals the judgment of the trial court dismissing with prejudice his class action petition against Missouri Lawyer Trust Account Foundation and the Honorable Stephen N. Limbaugh, Jr., the Honorable Duane Benton, the Honorable William Ray Price, Jr., the Honorable Ronnie L. White, the Honorable Michael A. Wolff, the Honorable Laura

Denvir Stith, and the Honorable Richard B. Teitelman, the judges of the Supreme Court of Missouri. Mr. Mottl's petition alleged that Missouri Supreme Court Rule 4-1.15, which established Missouri's Interest on Lawyers' Trust Accounts program, effects a taking of his private property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. The trial court dismissed the petition finding that it failed to state a claim upon which relief can be granted. Because the generation and transmission of IOLTA interest does not constitute state action, the judgment of the trial court is affirmed.

Facts

Supreme Court Rule 4-1.15 is a provision of the Rules of Professional Conduct that governs the safekeeping of property. Subsections (d) through (g) of the Rule govern Missouri's Interest on Lawyers' Trust Accounts (IOLTA) program, which allows a lawyer holding client funds that are so small in amount or held so briefly that they cannot earn net interest for the client to pool those funds with others like them and distribute the interest from the pooled account to the Missouri Lawyer Trust Account Foundation (the Foundation).[1] The Foundation, in turn, supports legal

---

[1] Rule 4-1.15 provides in pertinent part:

> (d) Except as provided in paragraph (e), a lawyer or law firm shall establish and maintain one or more interest-bearing insured depository accounts into which shall be deposited all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:
>
> * * * * *
>
> (2) only funds of clients that are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to clients may be deposited in such account. . . ;
>
> * * * * *

services for the poor. Rule 4-1.15 Supplemental Missouri Comment.

Mr. Mottl filed his petition on December 19, 2002, alleging that his lawyer, Robert Heggie, deposited $3,600 of his funds in an IOLTA account, that he did not desire to have his funds deposited into such account, and that the Foundation collected all the interest from the pooled IOLTA account into which his funds had been deposited. Mr. Mottl further alleged that the transfer of the IOLTA account interest to the Foundation was a taking without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Mr. Mottl, therefore, sought a declaration that the Foundation's and Supreme Court judges' retention and use of earnings on IOLTA funds is an unconstitutional taking of private property without just compensation, and injunctive and monetary relief for himself and a class of other clients whose funds had been placed into IOLTA accounts by Missouri lawyers.

The Foundation and the Supreme Court judges filed motions to dismiss on February 14, 2003, arguing that because participation in the IOLTA program is voluntary, the deposit of client funds in an IOLTA account and the transfer of interest from the account to the Foundation do not involve state action, an element required for Mr. Mottl to establish a constitutional violation.[2] Thereafter, Mr. Mottl moved to stay

---

> (4) the depository institution shall be directed by the lawyer or law firm establishing such accounts:
>
> > (i) to remit at least quarter-annually earnings from such account, net of any service charges or fees as computed in accordance with the institution's standard accounting practice, to the Missouri Lawyer Trust Account Foundation, which shall be the sole beneficial owner of the interest or earnings generated by such account.

[2] The Supreme Court judges' motion to dismiss also argued in the alternative that they were entitled to legislative immunity for promul-

argument and hearing on the motions pending the decision of the United States Supreme Court in a case involving a takings challenge to the Washington State IOLTA rule. Following the decision in March 2003 in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), which upheld the constitutionality of the Washington rule, the Supreme Court judges filed a supplemental memorandum in support of their motion to dismiss arguing that Rule 4-1.15 was the same as the Washington rule in all material respects.

After a hearing, the trial court entered its order and judgment dismissing Mr. Mottl's petition for failure to state a claim upon which relief can be granted. It ruled that because Rule 4-1.15, like the Washington rule at issue in *Brown*, permits client funds to be placed in an IOLTA account only when they would not be capable of earning net interest for the client, the Rule does not impose any loss on a client and, thus, the compensation due for any taking would be zero. Additionally, the trial court ruled that because of the voluntary nature of Missouri's IOLTA program, Mr. Mottl could not satisfy the state action requirement necessary to show a constitutional violation. This appeal by Mr. Mottl followed.

Standard of Review

A motion to dismiss for failure to state a cause of action attacks the adequacy of the plaintiff's petition. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (quoting *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993)). The petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action or of a cause

---

gating the rule and that, if state action were found to be present in the case, Mr. Heggie, Mr. Mottl's lawyer, must be viewed as the state actor and joined as an indispensable party. Because the state action issue is dispositive in this case, these alternative arguments are not addressed.

that might be adopted in the case. *Id.* (quoting Nazeri, 860 S.W.2d at 306).

An order granting a motion to dismiss is reviewed de novo. *Long v. Cross Reporting Serv., Inc.*, 103 S.W.3d 249, 252 (Mo. App. W.D. 2003), *cert. denied*, 124 S.Ct. 471, 157 L.Ed.2d 374 (2003). All factual allegations are assumed to be true, and the allegations are construed favorably to the plaintiff. *Id.* The petition is reviewed to determine whether it invokes principles of substantive law and whether the facts alleged, if proven, would entitle the plaintiff to relief. *Id.* (quoting *In re Swearingen*, 42 S.W.3d 741, 746 (Mo. App. W.D. 2001)).

Points On Appeal

Mr. Mottl raises two points on appeal. First, he claims that the trial court erred in ruling that *Brown* compels dismissal of the case because, unlike the Washington rule at issue in *Brown*, Rule 4-1.15 does not unambiguously forbid the deposit into IOLTA accounts of client funds that could earn net interest. Thus, argues Mr. Mottl, the plaintiffs are entitled to a trial on the issue of whether any "just compensation" is due. Second, Mr. Mottl claims that the trial court erred in ruling that state action cannot be demonstrated due to the voluntary nature of Missouri's IOLTA program. He argues that because the State enacted Rule 4-1.15 and designed the mechanism for the IOLTA program to take funds from accounts in regulated financial institutions, allocate those funds to the Foundation, and distribute the funds from the Foundation for the State's public purposes, the deposit of client funds into an IOLTA account and the subsequent transfer of interest from the IOLTA account to the Foundation were state action. Because the issue of state action is dispositive in this case, Mr. Mottl's first point is not addressed.

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457, 150 L.Ed.2d 592 (2001). It is applicable to the states through the Fourteenth Amendment, which prohibits states from denying federal constitutional rights and which guarantees due process. *Id.*; *Rendell-Baker v. Kohn*, 457 U.S. 830, 837, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982). The Fourteenth Amendment applies to acts of the states, not to acts of private persons or entities, and is only offended by action of the state. *Rendell-Baker*, 457 U.S. at 837, 838 n.6. Similarly, 42 U.S.C. § 1983, which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law. *Id.* at 838; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S.Ct. 977, 985, 143 L.Ed.2d 130 (1999). Like the "state action" requirement of the Fourteenth Amendment, the "under color of state law" element of a § 1983 action excludes merely private conduct no matter how discriminatory or wrongful.[3] *Id.* at 50 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)).

State action requires both action taken pursuant to state law and significant state involvement. *Id.* at 50 n.9. Specifically, state action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and that "the party charged with the deprivation must be a person who may fairly

---

[3] If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action "under color of state law" for § 1983 purposes. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn*, 531 U.S. 288, 295 n.2, 121 S.Ct. 924, 930, 148 L.Ed.2d 807 (2001) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)).

be said to be a state actor." *Id.* at 50 (quoting *Lugar*, 457 U.S. at 937). While the deposit of Mr. Mottl's funds into an IOLTA account and the transfer of interest earned on the account to the Foundation were authorized by Rule 4-1.15, thus satisfying the first requirement of the state action test, the inquiry does not end there. Rather, Mr. Mottl must also satisfy the second requirement, whether the allegedly unconstitutional conduct is fairly attributable to the State.[4] *Id.* (second requirement of state action test must be satisfied even where plaintiff attempts to characterize his claim as a "facial" or "direct" challenge to a state law).

Analysis of the second requirement for state action begins with identifying "the specific conduct of which the plaintiff complains." *Id.* at 51 (quoting *Blum*, 457 U.S. at 1004). The acts of which Mr. Mottl complains, of which he contends constitutes a taking of his personal property without just compensation, are the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation. The issue is

---

[4] Mr. Mottl contends that the trial court's application of the requirement of state action was incorrect in this case because the state officials who enforce the Rule are among the parties sued. "Where the defendant is a public official, the two elements of a § 1983 action merge." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 n.5, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978). "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights." *Id.* at 157 n.5. Although the Supreme Court judges are public officials, Mr. Mottl does not allege that their overt official involvement in the case or their joint participation with private persons or entities resulted in a taking of his private property without just compensation. Rather, Mr. Mottl alleges state action based on their creation and enforcement of Rule 4-1.15. Undoubtedly, the State is responsible for the Rule, and the procedural scheme created by the Rule is the product of state action. *Lugar*, 457 U.S. at 938, 941. The Rule is subject to constitutional restraints and properly may be addressed in a § 1983 action, however, if the second element of the state action test is met. *Id.* at 941.

whether these acts of private persons or entities are fairly attributable to the State.

Mr. Mottl argues that because the Supreme Court judges enacted Rule 4-1.15 creating the IOLTA program and are the primary influences on the actions of lawyers participating in the program through their control over the legal profession, a lawyer's deposit of client funds into an IOLTA account and the subsequent transfer of the interest to the Foundation are attributable to the State. "[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Flagg Bros.*, 436 U.S. at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170, 90 S.Ct. 1598, 1615, 26 L.Ed.2d 142 (1970)). That the State has "authorized" or "encouraged" the conduct by enacting a statute is insufficient to conclude that the conduct is attributable to the State. *Sullivan*, 526 U.S. at 52-53; *Flagg Bros.*, 436 U.S. at 164-65. Similarly, action taken by a private entity with the mere approval or acquiescence of the State is not state action. *Sullivan*, 526 U.S. at 52.

Unlike the Washington IOLTA program analyzed in *Brown*, which mandates participation, Missouri's program is voluntary. The Rule provides:

> A lawyer or law firm may elect to decline to maintain accounts as described in paragraph (d) by so notifying the Missouri Lawyer Trust Account Foundation in writing on or before January 31 of any year. A lawyer or law firm that does not so advise the Missouri Lawyer Trust Account Foundation shall be required to maintain such accounts.

Rule 4-1.15(f). Participation is not required, compelled, or coerced by the State. Rather, participation is authorized by Rule 4-1.15, resulting in, at best, mere approval or acquiescence by the State. Because of the voluntary nature of the IOLTA program, the decision to participate is in the

hands of the attorney or law firm and ultimately the client who selects his attorney. Thus, the acts of depositing client funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation are not attributable to the State.

Brown reinforces this holding. The Supreme Court noted that lawyers might mistakenly deposit client funds into an IOLTA account even though they could have generated net income for the client. *Brown*, 538 U.S. at 239. Doing so, however, would be contrary to the Washington Supreme Court rule, and "[a]ny conceivable net loss...was the consequence of . . . incorrect private decisions rather than any state action." *Id.* This reasoning supports the decision in this case that private decisions to deposit client funds into a Missouri IOLTA account destroy state action.

Because Mr. Mottl failed to plead facts showing that the challenged action is fairly attributable to the State, the trial court did not err in dismissing his petition. The judgment of the trial court is affirmed.

ROBERT G. ULRICH, Judge

Holliger, P.J. and Smart, J. concur.

APPENDIX B

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT OF
THE STATE OF MISSOURI

Case No. 02CV326315
Division II

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,
Plaintiff,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, *et al.*,
Defendants.

ORDER AND JUDGMENT

On this 18th day of April, 2003, this court again takes up the above-referenced cause for the purpose of entering its judgment.

On April 7, 2003, a hearing was held on Defendants' motions to dismiss. Mark D. Mittleman appeared on behalf of Plaintiff Robert Mottl, Paul Maguffee appeared on behalf of Defendants Limbaugh, Benton, Price, White, Wolff, Stith, and Teitleman, and Charlie A. Weiss and John W. Rogers appeared on behalf of Defendant Missouri Lawyer Trust Account Foundation. The Court, having read and considered the moving papers, opposition briefs, reply briefs and supplemental briefs, and having heard oral argument concludes for reasons hereinafter stated that Plaintiff's Petition fails to state a claim upon which relief can be granted. Therefore, the

Court grants Defendants' Motions to Dismiss and dismisses the Petition with prejudice.

On December 19, 2002, Plaintiff filed this action alleging that Missouri Supreme Court Rule 4-1.15—which establishes Missouri's Interest on Lawyers' Trust Accounts ("IOLTA") program and sets forth procedures governing its administration—triggers a taking of his private property without just compensation in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983. Plaintiff seeks a declaration that Rule 4-1.15 is unconstitutional, a permanent injunction prohibiting Defendants from acting under Rule 4-1.15, and compensatory damages and attorneys' fees.

Rule 4-1.15 is part of the Rules of Professional Conduct for Missouri lawyers. The underlying purpose of the Rule is to require that a lawyer not commingle his or her own funds with the funds of the client. Plaintiff focuses on subparagraph (d) of Rule 4-1.15 in his Petition. It provides in pertinent part:

> "Except as provided in paragraph (e), a lawyer or law firm shall establish and maintain one or more interest-bearing insured depository accounts into which shall be deposited all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:
>
> * * *
>
> (2) only funds of clients that are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients may be deposited in such account . . . .
>
> * * *

(4) the depository institution shall be directed by the lawyer or law firm establishing such accounts:

> (i) to remit at least quarter-annually earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice, to the Missouri Lawyer Trust Account Foundation, which shall be the sole beneficial owner of the interest or earnings generated by such account.

The Fifth and Fourteenth Amendments of the United States Constitution prohibits the governmental taking of "private property. . . for public use, without just compensation." U.S. Const. Amend. V. The issue for this court is whether the transmission of earned interest in the IOLTA accounts to the Missouri Lawyer Trust Account Foundation constitutes a taking of private property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Court finds that the Supreme Court's recent decision in *Brown v. Legal Foundation of Washington*, 538 U.S.__(2003), decides the issues and compels dismissal of this case. In *Brown*, the Court held that the State of Washington's mandatory IOLTA program did not violate the Fifth Amendment's prohibition on taking private property for public use without just compensation. Slip op. at 22. The Court reasoned that any "just compensation" required by the Fifth Amendment must be measured by the property owner's loss rather than the government's gain, and that because Washington's program prescribes a non-IOLTA account when net interest can be generated for the client, the compensation due to the client for any taking of interest generated from an IOLTA account would be zero. *Id.* at 17-19. The Court therefore held that there was no constitutional violation when the client was not compensated for the taking. *Id.* at 22.

In *Brown* the Supreme Court found it determinative that under Washington's Rules, client funds were not supposed to be placed in an IOLTA account if those funds could earn net interest for the client (after deducting transaction and administrative costs and bank fees). Slip op. at 21-22. Adopting the reasoning of the Ninth Circuit, the Court stated that "'[b]ecause of the way the IOLTA program operates, the compensation due [the clients] for any taking of their property would be nil. There was therefore no constitutional violation when they were not compensated.'" Slip op. at 22 (quoting *Washington Legal Foundation*, 271 F.3d at 861-862).

The aspect of Washington's Rule that the Supreme Court focused on in *Brown* is indistinguishable from Missouri's Rule 4-1.15. Both Rules only permit client funds to be placed in an IOLTA account if they "are nominal in amount or are expected to be held for a short period of time." Rule 4-1.15(d)(2); Washington RPC 1.14(c)(1). Missouri's Rule plainly contemplates that only those funds on which interest is not expected to be paid to the client can by placed in an IOLTA account. *See* Rule 4-1.15(d)(2) (stating that "only funds . . . on which interest is not paid to the clients may be deposited in such account . . . ."). In addition, the factors that Missouri's and Washington's Rules direct an attorney to follow in deciding whether to place particular client funds in an IOLTA account are virtually identical. *Compare* Rule 4-1.15(d)(2) *with* Washington RPC 1.14(c)(3). Thus, under both Missouri's and Washington's Rule, client funds may only be placed in an IOLTA account if they are not expected or capable of earning net interest for the client. *Id.*; *see also Brown*, Slip op. at 21.

So, as was the case in *Brown*, the net loss to a client whose funds are placed in an IOLTA account in accordance with Missouri's Rule 4-1.15(d) would be zero. Slip op. at 19. The compensation due to a client in that case would be zero and

thus there would be no taking without just compensation in violation of the Fifth Amendment. Slip op. at 22.

Aside from the issues of whether the transmission of IOLTA interest constitutes a taking, for which compensation must be paid, there is also the question of whether the generation and transmission of IOLTA interest constitutes "state action."

In analyzing what constitutes state action for purposes of the Fourteenth Amendment, it is well-settled that conduct cannot be attributed to the State simply because the State has "authorized" or even "encouraged" the conduct by enacting a statute. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978). Rather, the "State is responsible for the ... act of a private party when the State, by its law, has compelled the act" *id.* at 164 (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970)) or when state officials actively participate in depriving a plaintiff of property (*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 486-87 (1988)). In short, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Sullivan*, 526 U.S. at 52.

Unlike the Washington IOLTA program upheld by the Court in *Brown* which required lawyers to maintain IOLTA accounts, Missouri's program is voluntary. Paragraph (f) of Rule 4-1.15 provides:

> "A lawyer or law firm may elect to decline to maintain accounts as described in paragraph (d) by so notifying the Misssouri Lawyer Trust Account Foundation in writing on or before January 31 of any year."

Here, at best, the rule results in nothing more than state approval or acquiescence. Under Rule 4-1.15(f), a lawyer or law firm may elect not to maintain an IOLTA account. Thus, the ultimate decision to participate in the Missouri IOLTA program is in the hands of each individual attorney.

Participation in the program is neither required, compelled nor coerced by the State, but rather simply authorized.

Even in those situations where a client's lawyer voluntarily participates in the IOLTA program and inadvertently places a client's funds in an IOLTA account despite the fact that they were capable of earning positive net interest, those funds have been deposited in the IOLTA account contrary to the provisions of Rule 4-.15(d). As held in *Brown*, any loss to the client in that circumstance is attributable to the mistaken, private action of the attorney who made the deposit, not to any state action, and thus there would likewise be no violation of the Fifth Amendment. Slip op. at 22.

Under these circumstances Plaintiff cannot satisfy the state action requirement. *Sullivan*, 526 U.S. at 52-53; *Flagg Brothers*, 436 U.S. at 164-65. Because no state action can be demonstrated due to the voluntary nature of Missouri's IOLTA program, Plaintiff's claims premised on the Takings Clause found in the Fifth and Fourteenth Amendments to the United States Constitution also fails.

Because all of Plaintiff's claims are premised on an alleged violation of the Fifth and Fourteenth Amendments, and the Court concludes that those claims fail as a matter of law, the Petition is dismissed with prejudice.

/s/ Richard G. Callahan
RICHARD G. CALLAHAN, CIRCUIT JUDGE

APPENDIX C

MISSOURI COURT OF OF APPEALS
WESTERN DISTRICT

[Filed April 27, 2004]

WD63130

IMPORTANT NOTICE

To: All Attorneys of Record

Re: ROBERT MOTTL, Individually And On Behalf Of A Class Of All Others Similarly Situated,
Appellant,

vs.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, ET AL.,
Respondents;

HON. STEPHEN N. LIMBAUGH, JR., HON. DUANE BENTON, HON. WILLIAM RAY PRICE JR., HON. RONNIE L. WHITE, HON. MICHAEL A. WOLFF, HON LAURA DENVIR STITH, HON RICHARD B. TEITELMAN,
Respondents.

Please be advised that Appellant's motion for Rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.04.

/s/ Terence G. Lord
TERENCE G. LORD
Clerk

cc: Mark Mittleman
Karen Mitchell
Charles Weiss
314-863-5312
AG
314-259-2020

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

SC85971
WD63130

May Session, 2004

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,

Appellant,

vs. (TRANSFER)

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, *et al.*,

Respondents.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

Teitelman, J., not participating.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2004, and on the 25th day of May, 2004, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of May, 2004.

/s/ Thomas F. Simon
THOMAS F. SIMON, Clerk

_____D.C.

APPENDIX E

Missouri Rule of Professional Conduct 4-1.15

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the lawyer shall keep the property separate until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the lawyer shall keep the portion in dispute separate until the dispute is resolved.

(d) Except as provided in paragraph (e), a lawyer or law firm shall establish and maintain one or more interest-bearing insured depository accounts into which shall be deposited all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:

(1) no earnings from such account shall be made available to the lawyer or law firm, and the lawyer or law firm shall have no right or claim to such earnings;

(2) only funds of clients that are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients may be deposited in such account, taking into consideration the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients;

(3) funds deposited in such account shall be available for withdrawal or transfer on demand, subject only to any notice period that the institution is required to observe by law or regulation;

(4) the depository institution shall be directed by the lawyer or law firm establishing such accounts:

(i) to remit at least quarter-annually earnings from such account, net of any service charges or fees as computed in accordance with the institution's standard accounting practice, to the Missouri Lawyer Trust Account Foundation, which shall be the sole beneficial owner of the interest or earnings generated by such account; and

(ii) to transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm; and

(5) the lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances require further action with respect to the funds of any client.

(e) Every lawyer shall certify, in connection with this Court's annual enrollment fee statement and in such form as the clerk of this Court may prescribe, that the lawyer or the law firm with which the lawyer is associated either participates in the program as provided in Rule 1.15(d) or is exempt because the:

(1) Nature of the lawyer's or law firm's practice is such that the lawyer or law firm does not hold client or third party funds or is not required to maintain a trust account; or

(2) lawyer is primarily engaged in the practice of law in another jurisdiction and not regularly engaged in the practice of law in this state;

(3) lawyer is associated in a law firm with at least one lawyer who is admitted to practice in a jurisdiction other than the state of Missouri and the lawyer or law firm maintains a pooled interest-bearing trust account for the deposit of funds of clients or third persons in a financial institution located outside the state of Missouri and the interest, net of any service charges and fees, from the account is being remitted to the client or third person who owns the funds or to a nonprofit organization or government agency pursuant to the laws or rules governing lawyer conduct of the jurisdiction in which the financial institution is located;

(4) lawyer or law firm elects to decline to maintain accounts as described in paragraph (d) in accordance with the procedures set forth in paragraph (f); or

(5) Missouri Lawyer Trust Account Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the program when service charges on the lawyer's or law firm's trust account equals or exceeds any interest generated.

(f) A lawyer or law firm may elect to decline to maintain accounts as described in paragraph (d) by so notifying the Missouri Lawyer Trust Account Foundation in writing on or before January 31 of any year. A lawyer or law firm that does not so advise the Missouri Lawyer Trust Account Foundation shall be required to maintain such accounts.

(g) For purposes of paragraph (d) of this rule:

(1) "insured depository accounts" shall mean government insured accounts at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period that the institution is required to observe by law or regulation.

(2) The Missouri Lawyer Trust Account Foundation is that not-for-profit corporation described in this Court's Order of October 23, 1984.

APPENDIX F

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

[Filed Dec. 19, 2002]

Cause No. 02 CV326315
Division No. 2
Jury Trial Is Demanded

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,

Plaintiff,

vs.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, a Missouri not for profit corporation,

HONORABLE STEPHEN N. LIMBAUGH, JR., Chief Justice, Supreme Court of Missouri,

HONORABLE DUANE BENTON, Judge, Supreme Court of Missouri,

HONORABLE WILLIAM RAY PRICE, JR., Judge, Supreme Court of Missouri,

HONORABLE RONNIE L. WHITE, Judge, Supreme Court of Missouri,

HONORABLE MICHAEL A. WOLFF, Judge, Supreme Court of Missouri,

HONORABLE LAURA DENVIR STITH, Judge, Supreme Court of Missouri, and

HONORABLE RICHARD B. TEITELMAN, Judge, Supreme Court of Missouri,

Defendants.

CLASS ACTION PETITION

Plaintiff Robert Mottl, by his undersigned attorneys, states and alleges as follows, for his class action petition against the Defendants, Missouri Lawyer Trust Account Foundation, a Missouri not for profit corporation, hereinafter referred to as the "Fund", and the Honorable Stephen N. Limbaugh, Jr., Chief Justice, and the Honorable Duane Benton, William Ray Price, Jr., Ronnie L. White, Michael A. Wolff, Laura Denvir Stith and Richard B. Teitelman, Judges of the Supreme Court of Missouri, hereinafter collectively referred to as the "Supreme Court Defendants":

Introduction

1. This civil action for actual damages, declaratory and injunctive relief, attorneys' fees and costs, is brought as a class action challenging the State of Missouri's "Interest On Lawyers' Trust Accounts" program, hereinafter referred to as "IOLTA," set out and established by Missouri Supreme Court Rule of Professional Conduct 4-1.15(d), on the grounds that the program violates the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983, as well as Missouri state law.

2. Pursuant to the aforesaid Missouri Supreme Court Rule of Professional Conduct 4-1.15(d), hereinafter referred to as "the Rule" or "Rule 4-1.15(d)," private property in the possession of a lawyer or law firm representing clients such as Plaintiff, although actually owned by the clients, must be placed in a pooling account, with the Fund rather than the clients named as the beneficiary, whenever the lawyer or law firm deems such possession to be nominal or short-term. Under the Rule, the Fund collects all the interest from IOLTA accounts across the State of Missouri and applies it to such uses as the Fund determines to be in the public good.

3. The Defendants' failure to return the earnings on the funds in IOLTA accounts to Plaintiff and the other owners of

those funds, hereinafter defined and referred to as the "Class," constitutes a taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, under color of state law, in violation of 42 U.S.C. § 1983. Therefore, in this lawsuit Plaintiff seeks on his own behalf and on behalf of the Class a declaration that the Defendants' retention and use of earnings on IOLTA funds is unlawful; injunctive relief to prevent further violations of Plaintiff's and the Class's constitutional rights; an accounting to determine all the persons and/or entities to whom the Defendants have failed to remit earnings, and the amounts due to all such persons and/or entities; and a recovery of damages in the amount of all Plaintiff's and the Class's private property which has been wrongfully taken from them without just compensation, together with an award of their reasonable and appropriate attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988 and Missouri law, including Article I, Section 26 of the Constitution of Missouri and Missouri Rule of Civil Procedure 52.08.

4. Plaintiff brings this action on his own behalf and on behalf of the following Class:

> All persons or entities whose property has been placed into an IOLTA account whose beneficiary was the Lawyers Trust Fund of Missouri pursuant to Missouri Supreme Court Rule of Professional Conduct 4-1.15(d) and which has earned or will earn interest while in the IOLTA account with such interest paid to and retained by the Defendants without compensation being paid to the person or entity whose property was or will be used to earn such interest.

Parties, Jurisdiction and Venue

5. Plaintiff Robert Mottl is an individual and is a resident of the City of St. Louis, Missouri.

6. Plaintiff is and at all relevant times has been a client of Robert M. Heggie and Allan F. Stewart, lawyers licensed to practice in the State of Missouri whose law firm and office are located in St. Louis County, Missouri.

7. Defendant Missouri Lawyer Trust Account Foundation is a not for profit corporation incorporated under the laws of the State of Missouri, whose registered agent and office are located in Cole County, Missouri, and is the entity which has been appointed by the Supreme Court of Missouri and the Supreme Court Defendants to collect and disburse the interest and accruals on IOLTA accounts for the benefit of the State of Missouri.

8. Defendant Honorable Stephen N. Limbaugh, Jr. is the Chief Justice of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Limbaugh is sued in his official capacity.

9. Defendant Honorable Duane Benton is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Benton is sued in his official capacity.

10. Defendant Honorable William Ray Price, Jr. is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Price is sued in his official capacity.

11. Defendant Honorable Ronnie L. White is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant White is sued in his official capacity.

12. Defendant Honorable Michael A. Wolff is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Wolff is sued in his official capacity.

13. Defendant Honorable Laura Denvir Stith is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Stith is sued in her official capacity.

14. Defendant Honorable Richard B. Teitelman is a Judge of the Supreme Court of Missouri, the body responsible for the enactment, administration and supervision of Rule 4-1.15(d). Defendant Teitelman is sued in his official capacity.

15. The claims alleged herein arise under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983, as well as Missouri state law. Such claims are cognizable in this Court in that it is a court of general jurisdiction in the State of Missouri; and they are in part claims for damages in the nature of eminent domain upon which Plaintiff is entitled to jury trial pursuant to Article I, Section 26 of the Constitution of Missouri.

16. Venue is proper in this Court, pursuant to Section 508.010(1) and (2), R.S.Mo., in that the Supreme Court Defendants officially reside and may only be sued in their official capacity in Cole County, Missouri, and the Defendant Fund may be found within Cole County.

General Factual Allegations

17. The Supreme Court of Missouri adopted the original version of Rule of Professional Conduct 4-1.15(d) in 1984 in response to the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1832, which provided that funds owned by individuals, public entities and certain charitable organizations could earn interest in negotiable order of withdrawal ("NOW') accounts. Prior to that Act, NOW accounts were prohibited from generating interest income.

18. Since at least 1990 Rule 4-1.15(d) has required virtually all Missouri lawyers to deposit all nominal or short-term funds of their clients into a pooled interest-bearing trust account established with a bank or savings and loan association, with the Lawyers Trust Fund of Missouri designated as the income beneficiary. Each lawyer or law firm must direct the depository institution to remit the net interest or dividends computed on the average monthly balance of the account, or as otherwise computed in accordance with the institution's standard accounting practice, directly to the Fund.

19. The Fund is a not for profit Missouri corporation which was originally incorporated in 1984. The Fund became the beneficiary and administrator of the State of Missouri's Interest on Lawyers Trust Accounts (IOLTA) program, by order of the Supreme Court of Missouri dated October 23, 1984. The IOLTA program allows interest to be earned on nominal or short-term client deposits held in lawyers' pooled trust accounts.

20. The Fund is governed by a board which currently contains thirteen directors. The President of the Missouri Bar appoints the members of the board. The Fund's Board of Directors, in turn, grants the authority to spend the IOLTA funds which the Fund receives and administers to a specially created commission or executive staff director.

21. Since at least 1990, Missouri lawyers have been required to deposit, and have deposited, what they have determined to be nominal and short-term funds of their clients into IOLTA accounts. Such accounts have earned income which has been paid to the Fund, and which the Fund has distributed to various legal aid agencies and programs for the administration of justice and civil legal services to low-income individuals and families, in an amount exceeding $5,000,000.

22. In fiscal year 1997, the net IOLTA income on the IOLTA accounts of Missouri lawyers held in various depository institutions and collected by the Fund amounted to $1,046,697. The Fund itself earned interest and dividends in the amount of $54,507, and realized gains of $4,835 on the sale of investment securities. It made grants to various legal aid agencies and programs in the amount of $862,234 and incurred payroll, general and administrative expenses totaling $155,659.

23. In fiscal year 1998, the net IOLTA income on the IOLTA accounts of Missouri lawyers held in various depository institutions and collected by the Fund amounted to $1,036,442. The Fund itself earned interest and dividends in the amount of $59,289, and lost $9,888 on the sale of investment securities. It made grants to various legal aid agencies and programs in the amount of $950,689 and incurred payroll, general and administrative expenses totaling $160,420.

24. In fiscal year 1999, the net IOLTA income on the IOLTA accounts of Missouri lawyers held in various depository institutions and collected by the Fund amounted to $935,660. The Fund itself earned interest and dividends in the amount of $31,720, and lost $6,999 on the sale of investment securities. It made grants to various legal aid agencies and programs in the amount of $1,036,442 and incurred payroll, general and administrative expenses totaling $169,212.

25. In fiscal year 2000, the net IOLTA income on the IOLTA accounts of Missouri lawyers held in various depository institutions and collected by the Fund amounted to $1,004,121 . The Fund itself earned interest and dividends in the amount of $30,823, and realized gains of $1,729 on the sale of investment securities. It made grants to various legal aid agencies and programs in the amount of $791,169 and incurred payroll, general and administrative expenses totaling $158,309.

26. In fiscal year 2001, the net IOLTA income on the IOLTA accounts of Missouri lawyers held in various depository institutions and collected by the Fund amounted to $978,737. The Fund itself earned interest and dividends in the amount of $25,772, and lost $19,954 on the sale of investment securities. It made grants to various legal aid agencies and programs in the amount of $878,437 and incurred payroll, general and administrative expenses totaling $157,096.

Factual Allegations in Regard to the
Representative Plaintiff's Account

27. On November 3, 1999, Robert M. Heggie, a Missouri lawyer whose office is located in St. Louis County, Missouri, deposited $3,600.00 of the funds of Plaintiff Robert Mottl, his client, into an IOLTA account at Mercantile Bank N.A. in St. Louis, where he held all or part of such funds continuously from November 3, 1999 to November 8, 1999. The funds were the proceeds from a settlement of certain claims of Plaintiff in the City of St. Louis, Missouri, for damages arising out of personal injuries to Plaintiff, in connection with which Heggie and Allan F. Stewart had represented him. The funds were to be allocated in part to Heggie and Stewart, for payment of their attorney's fees and reimbursement of the expenses they had advanced in connection with the prosecution of the claims, with the remainder to be paid out to Plaintiff.

28. Heggie made the deposit after determining that the $3,600.00 of Plaintiff's funds were nominal or short-term in nature, and thereafter he left the funds in the IOLTA account to the extent that he retained possession of them on behalf of Plaintiff on a nominal or short-term basis before distributing them as contemplated by his agreements with Plaintiff

29. Plaintiff did not desire to have his funds deposited into or retained in the IOLTA account pending their distribution.

30. The Fund collected all the interest from the pooled IOLTA account into which Plaintiff's funds had been deposited from November 3, 1999 to November 8, 1999.

31. To date, the Fund has not returned the interest gained on Plaintiff's funds in the IOLTA account nor compensated Plaintiff for the use of his funds.

Class Action Allegations

32. Plaintiff brings this action as a class action pursuant to Missouri Rule of Civil Procedure 52.08, on behalf of himself and the Class.

33. Plaintiff is unable to determine the exact number of individuals and entities which comprise the Class, since that information is solely within the possession and control of the Defendant Fund; the thousands of attorneys and law firms who have created IOLTA accounts, among the more than twenty-five thousand members of the Missouri Bar; and the various depository institutions within the State of Missouri which have offered and maintained IOLTA accounts. In any event, the Class exceeds one thousand in number and is sufficiently numerous to make joinder of all Class members as individuals impracticable if not impossible, as required by Missouri Rule of Civil Procedure 52.08(a)(1). By definition under Rule 4-1.15(d), the actual amount of interest at stake on the nominal or short-term funds held in IOLTA accounts for each Class member is relatively small, a factor which favors a class-wide resolution of the issues presented herein as opposed to cost-ineffective individual actions.

34. Common questions of law and fact exist, including but not limited to the following, which predominate over any questions affecting only individual members of the Class, as required by Missouri Rule of Civil Procedure 52.08(a)(2):

(a) Whether interest earned on property required under the Rule to be placed in IOLTA pooled accounts is the property of the members of the Class;

(b) Whether payment of interest on IOLTA accounts to the Fund and its designees pursuant to the Rule constitutes a taking of the property of the members of the Class for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States; and

(c) What constitutes a proper remedy for the taking of such property.

Conversely, the only individual questions affecting Class members are the precise amounts of each such Class member's property which has been wrongfully withheld by Defendants.

35. Plaintiff's claims are typical of those of other Class members, as required by Missouri Rule of Civil Procedure 52.08(a)(3), in that his private property was remitted to the Fund pursuant to Rule 1.15(d), and he did not receive the earnings which had accrued on his property while in IOLTA pooled accounts.

36. Plaintiff and his undersigned counsel will fairly and adequately protect the interests of the Class, as required by Missouri Rule of Civil Procedure 52.08(a)(4). The interests of Plaintiff as the Class representative are consistent with those of the Class, and he has no interests antagonistic to the Class. Plaintiff is represented by experienced and able counsel who have successfully represented plaintiff classes in complex matters throughout the United States in both Federal and state courts.

37. A class action is an appropriate method for the fair and efficient adjudication of the controvery, and class certification is appropriate under the provisions of Missouri Supreme Court Rule 52.08(b), in that:

(a) the prosecution of separate actions would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the Class which would

establish incompatible standards of conduct for the Defendants, or

(ii) adjudications with respect to individual Class members which would as a practical matter be dispositive of the interests of other Class members not parties to such adjudications, or would substantially impair or impede their ability to protect their interests;

(b) the Defendants have acted or refused to act on grounds generally applicable to the Class, making appropriate final injunctive or declaratory relief to the Class as a whole;

(c) questions of fact common to the members of the Class predominate over any questions affecting only individual members;

(d) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

(e) the numerosity, typicality, commonality and adequacy requirements for class actions under Rule 52.08(a) are satisfied.

COUNT I
The Fifth and Fourteenth Amendments
(On Behalf of Plaintiff and the Class)

38. Plaintiff repeats and realleges Paragraphs 1 through 37 of this Complaint as if the same were fully set forth herein.

39. The Fifth Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, provides in relevant part, "nor shall private property be taken for public use without just compensation."

40. The principal amounts required to be deposited in IOLTA accounts by Rule 4-1.15(d) are private property owned respectively by Plaintiff and the other members of the

Class. The interest earned on such funds while in the IOLTA accounts and confiscated by the Fund is also private property owned respectively by Plaintiff and the other members of the Class.

41. Rule 4-1.15(d) and the Defendants' policy and practice of retaining the interest earned on IOLTA accounts is a taking of private property for public use.

42. To date, no compensation has been paid to Plaintiff or any other members of the Class by the Fund, the Supreme Court Defendants, or the State of Missouri.

43. Rule 4-1.15(d), in naming the Fund as the beneficiary of the interest earned on pooled IOLTA accounts, provides a windfall to the Defendants and places upon property owners whose private property has been taken pursuant to the Rule an unfair burden which in fairness and equity should be borne by all citizens and taxpayers of the State of Missouri.

44. By retaining such interest accruals, the Defendants have violated and continue to violate the prohibitions of the Fifth and Fourteenth Amendments against taking private property without payment of just compensation.

45. Unless the Court declares Rule 4-1.15(d) unconstitutional and unlawful, and enjoins the Defendants from enforcing it, the Defendants will continue to enforce Rule 1.15(d) to the detriment of Plaintiff and the Class.

COUNT II
42 U.S.C. § 1983
(On Behalf of Plaintiff and the Class)

46. Plaintiff repeats and realleges Paragraphs 1 through 37 and 39 through 45 of this Complaint as if the same were fully set forth herein.

47. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

48. At all times, the Defendants acted under color of the state law of Missouri.

49. The Defendants' unlawful retention of the interest earned on Plaintiff's and the Class's private property was and is a taking of such property without just compensation, and therefore a deprivation of Plaintiff's and the Class's rights secured under the Fifth and Fourteenth Amendments to the Constitution of the United States and a violation of 42 U.S.C. § 1983.

50. Unless the Court declares Rule 4-1.15(d) unconstitutional and unlawful in violation of 42 U.S.C. § 1983 and enjoins the Defendants from enforcing it, the Defendants will continue to enforce Rule 4-1.15(d) to the detriment of Plaintiff and the Class.

Relief Sought

WHEREFORE, Plaintiff prays that the Court grant the following relief:

A. Determine that Count I and Count II of this action may each be maintained as a class action pursuant to Missouri law, including Missouri Rule of Civil Procedure 52.08, on behalf of the Class defined herein, and declare Plaintiff to be the proper Class representative and his counsel to be Class counsel.

B. Declare the requirement of Missouri Supreme Court Rule of Professional Conduct 4-1.15(d) that interest on IOLTA accounts be paid to the Lawyers Trust Fund of Illinois to be invalid, as an unconstitutional

taking of private property without just compensation pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and as a violation of Plaintiff's and the Class's rights under 42 U.S.C. §1983.

C. Enter temporary, preliminary and permanent orders providing for appropriate equitable and injunctive relief to prevent the Defendants from further pursuing the illegal policies, acts and practices complained of herein.

D. Order an accounting and accompanying equitable relief (a) to identify all persons who are members of the Class, whose funds were deposited into IOLTA accounts since the institution of Missouri Supreme Court Rule of Professional Conduct 4-1.15(d) and who did not receive payment of the interest, dividends and/or other accruals of earnings on such property while held in such IOLTA accounts, and (b) to determine the amounts of such earnings which were taken from each of such members of the Class without just compensation, together with the additional interest which Plaintiff and the other members of the Class would otherwise have earned thereon, calculated at the legally applicable rate, from the time such earnings were taken by the Fund to the date of judgment.

E. Upon a jury trial, enter a judgment for actual damages for Plaintiff and all the other members of the Class in the amount of the earnings which were taken from them without just compensation, together with additional interest at the applicable legal rate from the time such earnings were taken.

F. Award Plaintiff and the Class their reasonable attorneys' fees and costs.

G. Award the attorneys for Plaintiff and the Class reasonable attorneys' fees, together with expenses and costs of suit as allowed by law.

H. Award such other and further relief as the Court deems just and proper.

ROBERT MOTTL, individually and on behalf of the Class

By: /s/ Mark D. Mittleman

MARK D. MITTLEMAN
Missouri Bar Registration Number 24277
ROBERT M. HEGGIE
Missouri Bar Registration Number 38246
BEACH, STEWART, HEGGIE, MITTLEMAN
& CURTIS, L.L.C.
222 South Central Avenue, Suite 900
St. Louis, Missouri 63105
Telephone: (314) 863-8484
Fax: (314) 863-5312

Lead Counsel for Plaintiff

CHARLES R. WATKINS
Illinois Bar Registration Number 06211436
JOHN R. WYLIE
Illinois Bar Registration Number 6189251
SUSMAN & WATKINS
Two First National Plaza, Suite 600
Chicago, Illinois 60603
Telephone: (312) 346-3466
Fax: (312) 346-2829

Of Counsel for Plaintiff

APPENDIX G

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT OF
THE STATE OF MISSOURI

[Filed Feb. 14, 2003]

Case No. 02 CV 326315
Division II

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,
Plaintiff,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, *et al.*,
Defendants.

DEFENDANT MISSOURI LAWYER TRUST ACCOUNT FOUNDATION'S MOTION TO DISMISS

Defendant Missouri Lawyer Trust Account Foundation ("the Foundation"), by and through its undersigned counsel, moves to dismiss Plaintiff's Petition pursuant to Rule 55.27(a)(6), Mo. R. Civ. P., on the grounds that Plaintiff has failed to state a claim upon which relief can be granted. In support of its Motion, the Foundation states:

1. Plaintiff states that his attorney deposited $3,600 belonging to Plaintiff into an account at Mercantile Bank in St. Louis for approximately five days in 1999. Petition at ¶ 27. Plaintiff alleges that the interest earned on those funds was paid to the Foundation in accordance with Supreme Court Rule 4-1.15. *Id.* at ¶ 30.

2. Plaintiff contends that he did not desire to have his funds deposited into or retained in an Interest on Lawyer's Trust Account ("IOLTA"), but does not allege that he communicated his wishes to his attorney. Petition at ¶ 29. He further alleges that none of the interest earned on the $3,600 has been returned to him and that he was not otherwise compensated for the use of his funds. *Id.* at 31. Plaintiff does not claim that he requested that the interest earned on his money be returned to him or that he be otherwise compensated for the use of his money. *See* Petition.

3. Plaintiff alleges that the Foundation's failure to return the earnings on his funds constitutes a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendment to the United States Constitution. Petition at ¶ 44.

4. Private persons, no matter how egregious the conduct, cannot violate the Fifth or Fourteenth Amendments. *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citations omitted). Accordingly, Plaintiff must establish state action or his constitutional claims fail as a matter of law and his Petition must be dismissed.

5. In analyzing what constitutes state action for purposes of the Takings Clause, it is well-settled that conduct cannot be attributed to the State simply because the State had "authorized" or even "encouraged" the conduct by enacting a statute. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978). Rather, the "State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Id.* at 164 (citation omitted); *see also Sullivan*, 526 US. at 52 ("Action taken by private entities with the mere approval or acquiescence of the State is not state action.").

6. The holdings of *Flagg Brothers* and *Sullivan* establish that authorization or encouragement of private conduct is not state action. Unless a state has mandated or compelled private conduct (or coerced it in such a manner that the State's coercion is deemed to be compulsion), no state action can be found and a violation of the Fifth and Fourteenth Amendments cannot be proved.

7. Plaintiff's claims based on an alleged violation of the Takings Clause fail as a matter of law because Rule 4-1.15 simply authorizes an attorney and client to place client funds in an IOLTA account. Because neither the attorney nor client is compelled to place client funds in an IOLTA account under Rule 4-1.15, and such action is a voluntary choice of the attorney and client, there is no state action and no violation of the Takings Clause.

8. Under Rule 4-1.15(f), a lawyer or law firm may elect to decline to maintain an IOLTA account. Thus, the ultimate decision to participate in the Missouri IOLTA program is in the hands of each individual attorney. Participation in the program is neither coerced nor compelled by the State, but rather merely authorized, or at most encouraged.

9. Even if an individual attorney elects to maintain an IOLTA account under Rule 4-1.15(f), neither the attorney nor the client is compelled to deposit the client's funds in the IOLTA account. Rather, Rule 4-1.15(b) explicitly requires the attorney to "promptly notify the client" "[u]pon receiving funds or other property in which [the] client . . . has an interest." Rule 4-1.15(b). The Rule gives the client and attorney the discretion to place such funds in a non-IOLTA account. *See* Rule 4-1.15(d)(2) (stating that "only funds of clients that are nominal in amount or are expected to be held for a short period of time *and on which interest is not paid to the clients* may be deposited in such account . . . ."

(emphasis added); *see also* Rule 4-1.15(d)(5) (requiring periodic reevaluation of funds placed in an IOLTA account "to determine if changed circumstances require further action with respect to the funds of any client").

10. Thus, the Rule contemplates that a lawyer and his or her client determine, in the first instance, whether any interest earned on a client's funds is to be paid to the client. If the client wishes to have interest on his or her money paid to the client, then such funds shall not be deposited in an IOLTA account. *See* Rule 4-1.15(d)(2). Under Rule 4-1.15, only the lawyer and the client determine whether the money should be deposited in an interest-bearing account for the benefit of the Foundation. The decision is neither mandated nor compelled by the Supreme Court Rule.

11. Because the State does not compel the attorney or client to place client funds in an IOLTA account under Rule 4-1.15 and such action is a voluntary choice of the attorney and client, there is no state action and no violation of the Takings Clause. Accordingly, Count I fails as a matter of law.

12. In Count II, Plaintiff alleges a violation of 42 U.S.C. § 1983 (which is premised on the alleged violation of the Takings Clause) and in Count III he seeks his attorney's fees under 42 U.S.C. § 1988, which grants a court discretion to award fees to a prevailing party in a Section 1983 action. Because Rule 4-1.15 does not violate the Takings Clause, Plaintiff's Section 1983 claim fails. And, because Plaintiff cannot prevail on his Section 1983 claim, Plaintiff's Section 1988 claim fails as well, and should be dismissed.

13. Plaintiff has not and cannot show that Rule 4-1.15 violates the Takings Clause; thus, Counts I, II, and III all fail as a matter of law and should be dismissed.

14. The Foundation incorporates its accompanying memorandum of law in support of this motion.

15. The Foundation reserves all other defenses it has or may have to Plaintiff's purported claims and prayer for relief.

WHEREFORE, for the reasons set forth above and in the accompanying memorandum of law, Defendant Missouri Lawyer Trust Account Foundation requests that its Motion to Dismiss be granted and that the Petition be dismissed with prejudice, and for such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/ Charles A. Weiss
Charles A. Weiss-Mo Bar# 20299
John W. Rogers-MO BAR# 42845
Jennifer S. Kingston-Mo Bar# 49307

BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102

Attorneys for Defendant Missouri
Lawyer Trust Account Foundation

APPENDIX H

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Case No. 02CV326315

ROBERT MOTTL,

Petitioner,

v.

STEPHEN N. LIMBAUGH, JR. *et al.*

Respondents.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO JOIN INDISPENSABLE PARTY AND DISQUALIFY OPPOSING COUNSEL

Defendants Limbaugh, Benton, Price, White, Wolff, Stith, and Teitelman—the judges of the Supreme Court of Missouri—move this Court to dismiss Plaintiff's Petition pursuant to Rule 55.27(a)(6) for failure to state a claim upon which relief may be granted. In the alternative, the Supreme Court judges move pursuant to Rules 52.04 and 55.27(a)(7) for the Court to find that Plaintiff's own lawyer is an indispensable defendant in this action and disqualify Plaintiff's counsel. In support of these motions, the Supreme Court judges state the following:

1. The Supreme Court judges have filed a memorandum of law in support of this motion, which they incorporate by reference.

2. Plaintiff challenges the constitutionality of Missouri's Interest on Lawyers' Trust Account (IOLTA) program,

claiming that it violates protections of the Fifth and Fourteenth Amendments against uncompensated government taking of property. Plaintiff also seeks relief pursuant to 42 U.S.C. § 1983. Pet., ¶¶ 39-44.

3. The IOLTA program, established pursuant to Rule 4-1.15, allows a lawyer holding client funds that are so small in amount or held so briefly that they cannot earn net interest for the client to pool those funds with others like them and distribute the interest from the pooled account to the Missouri Lawyer Trust Account Foundation, which in turn supports legal services for the poor. Rule 4-1.15(d)-(f) and Supplemental Missouri Comment; Pet., ¶ 21.

4. Plaintiff asserts that his lawyer put some of Plaintiff's funds into an IOLTA account, that Plaintiff did not wish his funds to go into such an account, and that the interest from the account went to the Foundation. Pet., ¶¶ 27-31.

5. Plaintiff alleges that the transfer of the IOLTA account interest to the Foundation was a taking without just compensation. Pet., ¶¶ 39-44. He seeks injunctive and monetary relief for himself and a class of other clients whose funds have been placed in IOLTA accounts by Missouri lawyers. Pet., ¶¶ 4, 32-37, pages 13-14.

Dismissal for Lack of State Action

6. Plaintiff's Petition rests on his assertion that Missouri lawyers are mandated to place certain client funds in IOLTA accounts, but those assertions are wrong as a matter of law and therefore Plaintiff's Petition is fatally flawed. Pet., ¶¶ 2, 18, 21, 40; Rule 4-1.15(d)-(f).

7. The provisions of Rule 4-1.15(d)-(f) make clear that Missouri's IOLTA program is voluntary—each year a lawyer may choose whether to participate, and simply

sends a letter to the Foundation if he or she chooses not to do so.

8. As a result, whether a client's funds are placed in an IOLTA account, with the pooled interest going to the Foundation, is the result of a voluntary choice of the lawyer holding the funds and, by extension, of the client who chooses to leave funds with such a lawyer.

9. Thus, as a matter of law, there was no state action involved in the placement of Plaintiff's funds—or those of any other client—into an IOLTA account.

10. Without state action, Plaintiff can make no claim for relief under the Fifth and Fourteenth Amendments or under 42 U.S.C. § 1983 and thus his Petition must be dismissed because it fails to state a claim upon which relief can be granted.

Dismissal of Claims Against Judges Based on Legislative Immunity

11. In the alternative, Plaintiff's Petition alleges no basis to find any action by the Supreme Court judges other than their enactment of Rule 4-1.15.

12. The Supreme Court judges are entitled to legislative immunity with respect to enactment of Rule 4-1.15 and therefore Plaintiffs claims against them must be dismissed for failure to state a claim upon which relief can be granted.

Disqualification of Plaintiff's Counsel and Joinder of Counsel as Defendant

13. Further in the alternative, Plaintiff's Petition makes clear that it was his lawyer, Robert Heggie, who put Plaintiff's funds into an IOLTA account, without being mandated by any other defendant to do so. Pet., ¶¶ 27-28.

14. While there is no basis for a finding of state action here, if the Court were to think otherwise, it is clear that state action could only be found by viewing Heggie as the state actor and the person who deprived Plaintiff of his rights under color of state law.

15. Without the actual state actor named as a defendant, complete relief cannot be accorded among the parties and thus Heggie would be an indispensable party under Rule 52.04.

16. Thus, if the Court does not dismiss Plaintiff's Petition, it should order Heggie joined as a defendant and disqualify Plaintiffs' counsel pursuant to Rules 4-1.7 and 4-1.10.

WHEREFORE, the judges of the Missouri Supreme Court request that this Court enter judgment dismissing Plaintiff's Petition with prejudice. In the alternative, the judges request that this Court enter judgment dismissing Plaintiff's claims against them with prejudice. Further in the alternative, if the Court does not dismiss Plaintiff's Petition, the judges request that the Court order Robert Heggie joined as a defendant and order Plaintiff's counsel disqualified.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/ Paul R. Maguffee

KAREN KING MITCHELL
Chief Deputy Attorney General
Missouri Bar No. 34172

PAUL R. MAGUFFEE
Missouri Bar No. 48126

DUSTIN ALLISON
Missouri Bar No. 54013
Assistant Attorneys General

P.O. Box 899
Jefferson City, MO 65102
Phone No. (573) 751-8828
Fax No. (573) 751-7094

Attorneys for Defendants Limbaugh, Benton, Price, White, Wolff, Stith, and Teitelman

APPENDIX I

"Points Relied On" excerpted from Petitioner's Statement, Brief and Argument in the Missouri Court of Appeals, Western District, pages 9 and 10

POINTS RELIED ON

I

The Circuit Court erred in dismissing Plaintiff-Appellant's Class Action Petition for failure to state a claim upon which relief can be granted, in that:

> (A) the Court mistakenly held Defendants-Respondents' confiscation of the net earnings on certain client funds deposited into lawyers' IOLTA trust accounts pursuant to Missouri Supreme Court Rule of Professional Conduct 4-1.15 was not a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, because the Court incorrectly ruled that funds which could have earned net interest for clients could never have been deposited properly into IOLTA accounts under the Rule.

Brown v. Legal Foundation of Washington, 538 U.S. ___, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)

Buttress v. Taylor, 62 S.W.3d 672 (Mo.App.W.D. 2001)

Canel v. Topinka, 342 Ill.App.3d 65, 793 N.E.2d 845 (Ill.App.1st Dist. 2003)

Constitution of the United States, Amendment V

Constitution of the United States, Amendment XIV

42 U.S.C. § 1983

Missouri Supreme Court Rule of Professional Conduct 4-1.15

II

The Circuit Court erred in dismissing Plaintiff-Appellant's Class Action Petition for failure to state a claim upon which relief can be granted, in that:

> (B) the Court mistakenly held Defendants-Respondents' conduct did not constitute state action, because the Court incorrectly ruled not only that Missouri lawyers have the option and obligation under Missouri Supreme Court Rule of Professional Conduct 4-1.15 to avoid depositing clients' funds which could earn net interest into IOLTA accounts, but also that any such deposits by lawyers would wholly negate the state's role in taking such interest earnings for public use.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)

Brown v. Legal Foundation of Washington, 538 U.S. ___, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)

Canel v. Topinka, 342 Ill.App.3d 65, 793 N.E.2d 845 (Ill.App.1st Dist. 2003)

Harris v. Missouri Department of Conservation, 755 S.W.2d 726 (Mo.App.W.D. 1988)

Constitution of the United States, Amendment V

Constitution of the United States, Amendment XIV

42 U.S.C. § 1983

Missouri Supreme Court Rule of Professional Conduct 4-1.15

APPENDIX J

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD63130

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,
Plaintiff-Appellant,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, et al.,
Defendants-Respondents.

APPELLANT'S MOTION FOR REHEARING, OR IN THE ALTERNATIVE, APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Appellant Robert Mottl respectfully moves the Court for a rehearing of this appeal, pursuant to Missouri Rule of Civil Procedure 84.17(a)(1), on the grounds that the Court's Opinion dated March 23, 2004 overlooks and misinterprets significant matters of law and fact, including:

1. In holding that the taking of Appellant's property, pursuant to the IOLTA program created by Missouri Rule of Professional Conduct 4-1.15, was not "fairly attributable to the State" of Missouri but rather "action taken by a private entity with the mere approval or acquiescence of the State"—and therefore not actionable under the Fifth and Fourteenth Amendments to the Constitution of the United States—the Opinion misinterprets *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), which held as a matter of law that takings of the same kind, under the IOLTA rule of the State of Washington, were

indeed *per se* takings by the state within the meanings of those constitutional provisions.

2. In holding that participation in the IOLTA program is "not required, compelled or coerced by the State" because the program is "voluntary," the Opinion overlooks the fact, set out in Appellant's principal Brief at pages 27 and 42 and Appellant's Reply Brief at pages 2 and 5, that the Missouri IOLTA program is *not* voluntary, but rather an "opt-out" program, in which the possibility for Appellant's attorney to opt out at the time affecting the deposit of Appellant's funds was nonexistent. W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990).

3. In holding that "the specific conduct of which the plaintiff complains" was only "the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation", the Opinion overlooks the facts, set out in Appellant's Petition at Paragraphs 2, 3, 19, 21, 31, 40-45, and 50 (L.F. 2-3, 6, 12, 13), that Appellant does *not* complain of the acts of his attorney, but *does* complain of not only the transfer of the interest, but also the taking, retention and use of the interest by the Respondent Foundation for public purposes approved by State authority, without just compensation; and he complains of the enforcement of Rule 4-1.15 by State officials.

4. In holding that "private decisions to deposit client funds into a Missouri IOLTA account destroy state action", the Opinion misinterprets the constitutional law of state action as established by decisions of the Supreme Court of the United States, which does not hold that, where state action affecting a party exists, such state action can nonetheless be destroyed by private decisions. To the contrary, in *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1963)—a case noted with approval in authorities relied upon by both Appellant and the Opinion itself, including *Adickes v.*

S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 36 L.Ed.2d 142 (1970) and *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 422 (1982)—even criminal acts by the private parties acting together with state officials did not negate or destroy the element of state action. *West v. Atkins*, 487 U.S. 42, at 52, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), holds with regard to the state action issue that "Defendants are not removed from the purview of § 1983 simply because they are professionals acting in accordance with professional discretion and judgment."

5. In holding that *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.130 (1999), and *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), support its decision, the Opinion misinterprets those cases—which were not "takings" cases, and in which the states in question never received the use of private funds—and the Opinion also overlooks the differences between those cases' facts and those of the present case, as well as overlooking more pertinent, subsequently decided legal authority involving the pervasive intertwining of state and private action, like that involved here, including *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

Suggestions in Support of the Motion for Rehearing

There are numerous examples of Missouri cases demonstrating that the Court of Appeals will in fact grant rehearing in cases where a party shows that the Court has "overlooked material matters of fact" and "misinterpreted the law"; and when this occurs, it leaves the appeal "as if it had never been heard and the opinion filed became a nullity as if it had never been written." The case should then receive "entirely fresh consideration" and the Court may "adopt its former opinion, modify or expand its former opinion, or adopt a new and

different opinion". *Coulter v. Michelin Tire Corporation*, 622 S.W.2d 421, at 437 (Mo.App.S.D. 1981).

Appellant recognizes that it is possible the errors in the panel's Opinion here, which appear to overlook and mis-interpret material issues of fact and law, were actually intentional and not inadvertent. It may be that the panel believed Respondents should prevail in this case as a matter of public policy, even though Appellant would technically be entitled to reversal on the existing state of the record and the law; and that the panel could find no other way to uphold the Circuit Court's judgment. However, Appellant respectfully suggests that it is not the proper role of an intermediate appellate court to make such public policy determinations, nor to decide cases in such a fashion.

Due process requires that cases be decided on the basis of their actual facts and applicable law, not such hypothetical facts and law as might justify an (arguably) more convenient or desirable result. "It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered and which renders judgment only after trial." *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, at 903 (Mo. banc 1950).

Questions of policy are for the legislature, not the courts, *Lefman v. Schuler*, 296 S. W. 808, at 815 (Mo. 1927), and "usurpations of power by a court of last resort under a constitutional government should not knowingly occur." *Beasley v. Athens*, 277 S.W.2d 538, at 539 (Mo. 1955). The doctrine of separation of powers is not meant to "promote efficiency but to preclude the exercise of arbitrary power." *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, at 135 (Mo. banc 1997).

The Court of Appeals is constitutionally bound to follow the most recent controlling decision of the Supreme Court. *Schumann v. Missouri Highway and Transportation Commision*, 912 S.W.2d 548 (Mo.App.W.D. 1995). It does not have the constitutional power to overrule such decisions. *Noe v. Pipe Works, Inc.*, 874 S.W.2d 502 (Mo.App.E.D. 1994).

Alternatively, Transfer of the Appeal Is Warranted

In the alternative, Appellant respectfully moves the Court, pursuant to Missouri Rules of Civil Procedure 83.02 and 83.05, for transfer of this case to the Supreme Court of Missouri, as set out in the accompanying Application for Transfer:

> (a) because of the general interest and importance of the questions raised herein with regard to state action and the interpretation, application and enforcement of Missouri Rule of Professional Conduct 4-1.15, which potentially affect all lawyers and many of their clients throughout this State, both retrospectively and in the future, and
>
> (b) for the purpose of reexamining the existing law of state action, if that law is to be interpreted to find no state action herein.

WHEREFORE, Appellant requests rehearing of this case by this Court or, in the alternative, transfer of this case to the Supreme Court of Missouri.

BEACH, STEWART, HEGGIE,
MITTLEMAN & CURTIS, L.L.C.

/s/ Mark D. Mittleman
MARK D. MITTLEMAN
Missouri Bar Registration Number 24277
ROBERT M. HEGGIE
Missouri Bar Registration Number 38246
222 South Central Avenue, Suite 900
St. Louis, Missouri 63105
Telephone: (314) 863-8484
Fax: (314) 863-5312

Lead Counsel for Plaintiff-Appellant

CHARLES R. WATKINS
Illinois Bar Registration Number 06211436
JOHN R. WYLIE
Illinois Bar Registration Number 6189251
SUSMAN & WATKINS
Two First National Plaza, Suite 600
Chicago, Illinois 60603
Telephone: (312) 346-3466
Fax: (312) 346-2829

Of Counsel for Plaintiff-Appellant

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD63130

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,
Plaintiff-Appellant,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, et al.,
Defendants-Respondents.

APPELLANT'S APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Appellant respectfully moves the Court, pursuant to Missouri Rule of Civil Procedure 83.02 and 83.05, for transfer of this case to the Supreme Court of Missouri:

(A) because of the general interest and importance of the questions raised herein, affecting all lawyers and many of their clients throughout this State, with regard to (1) the presence or absence of "state action" in the taking of Appellant's property without just compensation, pursuant to Missouri's Interest On Lawyer Trust Accounts program, and (2) the interpretation and enforcement of Missouri Rule of Professional Conduct 4-1.15, which the Court's Opinion of March 23, 2004 held to create a "voluntary" IOLTA program; and

(B) for the purpose of reexamining the existing constitutional law of "state action," including the governing Federal precedent of *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), which is contrary to the Court's Opinion.

Statement of Facts

This is an appeal from the Circuit Court's dismissal of Appellant's Class Action Complaint, on Respondents' motions, for failure to state a claim upon which relief can be granted. The Complaint alleged that, under Missouri's Interest on Lawyer Trust Accounts ("IOLTA") program and Rule 4-1.15, the Respondents took Appellant's property—the net interest earned by his funds when his lawyer, following the instructions of the Rule, deposited them into an IOLTA account—for public use without just compensation. The Complaint sought both damages and equitable relief for Appellant and the class he seeks to represent, directly under the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as under 42 U.S.C. § 1983.

Most of the facts stated in the introductory paragraph and the "Facts" section (at pages 1-4) of the Court's Opinion of March 23, 2004 are correct, but some of the statements there, and elsewhere in the Opinion, are not actually facts reflected in the record. For example, the statement at page 2 that the Interest On Lawyer Trust Accounts ("IOLTA") program "allows a lawyer holding client funds that are so small in amount or held so briefly that they cannot earn net interest for the client to pool those funds with others like them and distribute the interest from the pooled account to the Missouri Lawyer Trust Account Foundation" is really an interpretative conclusion, and it is inaccurate to the extent that it suggests the lawyer distributes the interest, or has a choice to do so. Actually, Rule 4-1.15(d)(4)(i) expressly makes the Foundation the owner of the interest and requires the bank in which the funds were deposited to make the distribution.

The same statement is also incomplete, to the extent that Missouri's Rule—unlike the rule in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)—at least arguably allows and even compels the lawyer to deposit *other* client funds, of greater

amounts or for longer durations, in IOLTA accounts. Whether the Rule actually does so is, in fact, an issue which the Opinion (at page 5) expressly declined to decide, holding only that the dismissal was justified because "state action" is lacking.

The Opinion (at page 5) correctly characterizes Appellant's first point on appeal, but is not fully accurate in its characterization of the second point. Appellant's second point is not only, or even primarily, that "the deposit of client funds into an IOLTA account and the subsequent transfer of interest from the IOLTA account to the Foundation" constituted state action; rather, he contends that there was state action throughout the taking, retention and use of the interest by the Respondent Foundation for public purposes, as approved by State authority, and throughout the enforcement of Rule 4-1.15 by State officials. *See* Appellant's principal Brief at 1, 5, 35-36, and 37-44 and his Reply Brief at 1, 5, 14, and 17-18.

Footnote 4 to the Court's Opinion (at page 6) is similarly incorrect where it says that Appellant does not allege that State actors' "overt official involvement in the case or their joint participation with private persons or entities resulted in a taking of his private property without just compensation"; and the Opinion is again incorrect in the same respect (at page 7) where it states that "the specific conduct of which the plaintiff complains" was only "the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation." To the contrary, Appellant does *not* complain of the acts of his attorney, but *does* complain about the taking, retention and use of the interest by the Respondent Foundation for public purposes as approved by State authority, and the enforcement of Rule 4-1.15 by the State. *See* Appellant's Petition at Paragraphs 2, 3, 19, 21, 31, 40-45, and 50 (L.F. 2-3, 6, 12, 13), as well as his principal Brief at 1, 5, 35-36, and 37-44 and Reply Brief at 1, 5, 14, and 17-18. Indeed, Appellant does

not claim any impropriety in the deposit, transfer or taking of Appellant's property for public use, as such; it was only the taking of such property *without just compensation by the State* that created legal grounds for his complaint. *Cf. Brown, supra*, 138 U.S. at 235.

Finally, the Opinion is incorrect as a matter of fact in stating (at pages 7-8) that "Missouri's program is voluntary." The Opinion overlooks the clear fact, set out in Appellant's principal Brief at pages 27 and 42 and Appellant's Reply Brief at pages 2 and 5, that the Missouri IOLTA program is *not* voluntary, but rather an "opt-out" program. W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990). Indeed, the possibility for Appellant's attorney to opt out *at the time affecting the deposit of Appellant's funds* was nonexistent. Rule 4-1.15(f), which is cited in the Opinion, does not make the program "voluntary" in any meaningful sense, even for lawyers—particularly in a year when they have already missed the "opt-out" deadline, and are thereafter bound to participate in it for the remainder of that year. (As shown at pages 16-17 of Appellant's principal Brief, the Rule does not and could not make participation voluntary on the part of clients.) Even the Presiding Judge of the Court of Appeals panel which heard the appeal acknowledged informally, during oral argument, that the possibility for lawyers to opt out of the IOLTA program was not widely known in the past. Moreover, taking Rule 4-1.15(f) together with the Rule's entire text, including subsections (d) and (e), it is clear that once a lawyer has been induced to participate in the program at all, compliance with its terms for the deposit of "all" client funds thereafter becomes mandatory, not voluntary.

The Legal Basis for Transfer

(A) The general interest and importance of the questions raised herein.

The issues in this case clearly fall within the scope of the term "general interest or importance" as defined and applied in Missouri case law. Constitution of Missouri, Article V, Section 10; *see, e.g., Beetschen v. Shell Pipe Line Company*, 248 S.W.2d 66 (Mo.App.St.L. 1952), *affirmed* 253 S.W.2d 785 (Mo. 1952) [the liability of a private party taking part in eminent domain raised issues subject to transfer]; *State ex rel. Morton v. Cave*, 220 S.W.2d 45 (Mo. 1949) [the issue of taxing costs in professional disciplinary proceedings was subject to transfer as a recurring question of importance to the general public, not confined to the particular attorneys involved]; *Williams v. Williams*, 498 S.W.2d 585 (Mo.App. St.L. 1973) [constitutional issues of equal protection for the mother and father in a child support case warranted transfer]; *Kuyper v. Stone County Commission*, 838 S.W.2d 436 (Mo. banc 1992) [whether a county commission may determine the salary of a person hired by the county assessor with already-budgeted funds was a proper issue for transfer].

The issue of "state action" is a matter of general interest and importance, with implications not only for takings cases, and for lawyers making deposits of client funds into trust accounts, but more generally in all areas of overlapping public and private conduct within Missouri which could be affected by Federal constitutional law and the ubiquitous 42 U.S.C. § 1983. The scope of "state action" is a difficult problem which in many cases has required determination by the Supreme Court of the United States. A holding that state action does not exist in the present case, despite the IOLTA program's clear and pervasive entwinement of State regulation and action with private conduct—which appears to contradict the established precedent of *Brentwood Academy, supra* (a case specifically referring to the presence of state

action where there is "public entwinement in the management of ostensibly separate trusts", *id.* at 531 U.S. 297), as well as other Supreme Court decisions including *West v. Atkins*, 487 U.S. 42, at 52, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 36 L.Ed.2d 142 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 422 (1982); and *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152,16 L.Ed.2d 267 (1963)—should not stand without a definitive review and interpretation by Missouri's highest court.

Not only the "state action" issue, but the specific IOLTA issues of this case are of very significant general interest and importance, particularly to the legal profession itself but also to the public at large. *In re Griffey*, 873 S.W.2d 600, at 603 (Mo. banc 1994), a disciplinary proceeding in which a Missouri lawyer was found to have violated Rule 4-1.15, states that "Even an unintentional mishandling of client funds by an attorney can justify disbarment." It has been held that "Misappropriation of a client's funds, entrusted to an attorney's care, is always grounds for disbarment" and that restitution of converted funds is not a defense, so that the rules regarding lawyers' escrow accounts "properly demand procedures that not only guarantee that the client's funds will not be misappropriated but also enable the attorney readily to demonstrate that no misappropriation has occurred." *In re Schaeffer*, 824 S.W.2d 1, at 5 (Mo. banc 1982). Failing to maintain a proper trust account is also grounds for disbarment. *In re Barr*, 796 S.W.2d 617 (Mo. banc 1990); *Matter of Williams*, 711 S.W.2d 518 (Mo. banc 1982). Yet, while the sanctions for violation of the Rule are clear, there have been no cases to date interpreting its actual meaning and application with regard to lawyers' maintenance and use of IOLTA accounts.

Therefore, all lawyers in Missouri, and their clients as well, need authoritative guidance on (1) whether lawyers' partici-

pation in the program is indeed "voluntary," (2) whether a lawyer who participates in the program may or may not deposit client funds which could earn net interest into an IOLTA account, and (3) whether a lawyer's actions in depositing such funds could lead to personal liability to the client (as suggested in *Brown*, supra, 138 U.S. at 239)—or (4) whether alternatively, as Appellant contends, the client is entitled to recover just compensation from the State for the taking of the interest.

(B) The clear need to reexamine existing precedent on "state action."

Cases have been transferred to the Supreme Court of Missouri after opinions of the Court of Appeals in order to reexamine the existing law on such relatively arcane subjects as waiver under the former "Dead Man's Statute," *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125 (Mo. banc 1985), collateral attack on a divorce decree, *In re Duncan*, 360 S.W.2d 361 (Mo.App.St.L. 1962), and life insurance applications, *Baugh v. Life and Casualty Insurance Company of Tennessee*, 299 S.W.2d 554 (Mo.App.St.L. 1957). Here, the substantial departure from existing law on "state action" which the panel's Opinion would accomplish is a matter which should be decided by the Supreme Court of Missouri after transfer, not by this Court alone.

The Opinion cites existing authority (at page 6) that state action requires *both* "an alleged constitutional deprivation 'caused by . . . a rule of conduct imposed by the State . . .' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor'"; but it then holds that while the first element is present here, the second—which the Opinion immediately re-characterizes as "whether the allegedly unconstitutional conduct is fairly attributable to the State"—is not. The Opinion makes no mention of the more relevant precedent of *Brentwood Acad-*

emy, *supra*, and its doctrine of "entwinement," although they were cited by Appellant in its principal Brief (at page 40).

The Opinion then also re-characterizes Appellant's claims from the statements of his actual Petition by saying without any warrant (at page 7)—and seemingly in conflict with its own Footnote 4 and its own citation of *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)—that "the acts of which Mr. Mottl complains . . . are the acts of his attorney" for which the State is not responsible. Finally, it suggests (at page 8) that "private decisions" (here, to deposit client funds into a Missouri IOLTA account) can somehow "destroy state action." These are remarkable innovations in the law of state action, contradicting such long-established precedents as *Brentwood Academy*, *West v. Atkins*, *Adickes v. S. H. Kress & Co.*, *Lugar v. Edmondson Oil Co., Inc.*, and *United States v. Price, supra*. What they amount to is an entirely new doctrine that a finding of "state action" must ultimately depend upon an unregulated exercise of judicial discretion to decide whether conduct meets a vague and flexible standard of being "fairly attributable to the State." If that change is indeed warranted by reexamination of the existing law, and Appellant asserts that it is not, at least the Supreme Court of Missouri, if not the Supreme Court of the United States, is the forum where it should be determined.

(C) Other legal considerations regarding transfer to the Supreme Court.

Finally, Appellant notes that while the seven individual Judges of the Supreme Court of Missouri are named as parties herein, albeit only in their official capacities, the Supreme Court as an institution is still the appropriate forum to determine the issues raised by this case. The Supreme Court can do so by designating other members of the Missouri judiciary to hear and determine the case, in place of the Judges who are named parties and therefore ineligible to do so, a procedure which has occurred before, *e.g.* in *State ex rel.*

Nixon v. American Tobacco Company, 34 S.W.3d 122 (Mo. banc 2000).

WHEREFORE, Appellant requests rehearing of this case by this Court or, in the alternative, transfer of this case to the Supreme Court of Missouri.

BEACH, STEWART, HEGGIE,
MITTLEMAN & CURTIS, L.L.C.

/s/ Mark D. Mittleman
MARK D. MITTLEMAN
Missouri Bar Registration Number 24277
ROBERT M. HEGGIE
Missouri Bar Registration Number 38246
222 South Central Avenue, Suite 900
St. Louis, Missouri 63105
Telephone: (314) 863-8484
Fax: (314) 863-5312

Lead Counsel for Plaintiff-Appellant

CHARLES R. WATKINS
Illinois Bar Registration Number 06211436
JOHN R. WYLIE
Illinois Bar Registration Number 6189251
SUSMAN & WATKINS
Two First National Plaza, Suite 600
Chicago, Illinois 60603
Telephone: (312) 346-3466
Fax: (312) 346-2829

Of Counsel for Plaintiff-Appellant

APPENDIX K

IN THE SUPREME COURT OF MISSOURI

[Filed May 4, 2004]

Circuit Court No. 02CV326315
Court of Appeals No. WD63130
Supreme Court No. ___
Court of Appeals, Western District
Circuit Court for Cole County

ROBERT MOTTL, individually and on behalf of a class of all others similarly situated,
Plaintiff-Appellant,

vs.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION, *et al.*,
Defendants-Respondents.

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion No or after opinion Yes
(Check appropriate option)

[Please complete all of the following that are applicable:]

The date the record on appeal was filed	August 15, 2003
The date the Court of Appeals opinion was filed	March 23, 2004
The date the motion for rehearing was filed	April 7, 2004
and ruled on	April 27, 2004
The date the application for transfer was filed in the Court of Appeals	April 7, 2004
and ruled on	April 27, 2004

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

Party	Attorney
Robert Mottl, Plaintiff-Appellant	X Mark D. Mittleman Robert M. Heggie 222 South Central Avenue, Suite 900 St. Louis, Missouri 63105 Charles R. Watkins John R. Wylie Two First National Plaza, Suite 600 Chicago, Illinois 60603
Missouri Lawyer Trust Account Foundation, Defendant-Respondent	__ Charles A. Weiss John W. Rogers Jennifer S. Kingston One Metropolitan Square, Suite 3600 211 North Broadway St. Louis, Missouri 63102
Honorable Stephen N. Limbaugh, Jr., Honorable Duane Benton, Honorable William Ray Price, Jr., Honorable Ronnie L. White, Honorable Michael A. Wolff, Honorable Laura Denvir Stith, and Honorable Richard B. Teitelman, Defendants-Respondents	__ Jeremiah W. (Jay) Nixon, __ Attorney General of Missouri __ Karen King Mitchell, __ Deputy Attorney General __ Paul R. Maguffee, __ Assistant Attorney General __ Dustin J. Allison, Assistant Attorney General P. O. Box 899 Jefferson City, Missouri 65102

APPELLANT'S APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

Appellant respectfully moves the Court, pursuant to Missouri Rule of Civil Procedure 83.02, 83.04 and 83.05, for transfer of this case from the Missouri Court of Appeals, Western District, after the issuance of its opinion, to the Supreme Court of Missouri:

(A) because of the general interest and importance of the questions raised herein, affecting all lawyers and many of their clients throughout this State, with regard to

> (1) the presence or absence of "state action" in the taking of Appellant's property without just compensation, pursuant to Missouri's Interest On Lawyer Trust Accounts ("IOLTA") program, and
>
> (2) the interpretation and enforcement of Missouri Rule of Professional Conduct 4-1.15, which the Court of Appeals's Opinion of March 23, 2004 held to create a "voluntary" IOLTA program not constituting "state action" subject to the Fifth and Fourteenth Amendments to the Constitution of the United States, even if it induces lawyers to deposit their clients' funds into IOLTA accounts from which the net interest is taken for public use without just compensation to the clients; and

(B) for the purpose of reexamining the existing constitutional law of "state action," including the governing Federal precedents of *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), which are binding in Missouri and contrary to the Court of Appeals's Opinion.

Statement of Facts

This is an appeal from the Circuit Court's dismissal of Appellant's Class Action Complaint, on Respondents' motions, for failure to state a claim upon which relief can be granted. The Complaint alleged that, under Missouri's Interest on Lawyer Trust Accounts ("IOLTA") program and Rule 4-1.15, the Respondents took Appellant's property—the net interest earned by his funds when his lawyer, following the instructions of the Rule, deposited them into an IOLTA account—for public use without just compensation. The Complaint sought both damages and equitable relief for Appellant and the class he seeks to represent, directly under the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as under 42 U.S.C. § 1983.

Most of the facts stated in the introductory paragraph and the "Facts" section (at pages 1-4) of the Court of Appeals's Opinion of March 23, 2004 are correct, but some of the statements there, and elsewhere in the Opinion, are not actually facts reflected in the record. For example, the statement at page 2 that the Interest On Lawyer Trust Accounts ("IOLTA") program "allows a lawyer holding client funds that are so small in amount or held so briefly that they cannot earn net interest for the client to pool those funds with others like them and distribute the interest from the pooled account to the Missouri Lawyer Trust Account Foundation" is really an interpretative conclusion, and it is inaccurate to the extent that it suggests the lawyer distributes the interest, or has a choice to do so. Actually, Rule 4-1.15(d)(4)(i) expressly makes the Foundation the owner of the interest and requires the bank in which the funds were deposited to make the distribution.

The same statement is also incomplete, to the extent that Missouri's Rule—unlike the rule in *Brown v. Legal Foundation of Washington, supra*—at least arguably allows and even compels the lawyer to deposit *other* client funds, of

greater amounts or for longer durations, in IOLTA accounts. Whether the Rule actually does so is, in fact, an issue which the Opinion (at page 5) expressly declined to decide, holding only that the dismissal was justified because "state action" is lacking.

The Opinion (at page 5) correctly characterizes Appellant's first point on appeal, but is not fully accurate in its characterization of the second point. Appellant's second point is not only, or even primarily, that "the deposit of client funds into an IOLTA account and the subsequent transfer of interest from the IOLTA account to the Foundation" constituted state action; rather, he contends that there was state action throughout the taking, retention and use of the interest by the Respondent Foundation for public purposes, as approved by State authority, and throughout the enforcement of Rule 4-1.15 by State officials. *See* Appellant's principal Brief in the Court of Appeals at 1, 5, 35-36, and 37-44 and his Reply Brief at 1, 5, 14, and 17-18.

Footnote 4 to the Court of Appeals's Opinion (at page 6) is similarly incorrect where it says that Appellant does not allege that State actors' "overt official involvement in the case or their joint participation with private persons or entities resulted in a taking of his private property without just compensation"; and the Opinion is again incorrect in the same respect (at page 7) where it states that "the specific conduct of which the plaintiff complains" was only "the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation." To the contrary, Appellant does *not* complain of the acts of his attorney, but *does* complain about the taking, retention and use of the interest by the Respondent Foundation for public purposes as approved by State authority, and the enforcement of Rule 4-1.15 by the State. *See* Appellant's Petition at Paragraphs 2, 3, 19, 21, 31, 40-45, and 50 (L.F. 2-3, 6, 12, 13), as well as his principal Brief in

the Court of Appeals at 1, 5, 35-36, and 37-44 and Reply Brief at 1, 5, 14, and 17-18. Indeed, Appellant does not claim impropriety in the deposit, transfer or taking of Appellant's property for public use, as such; it was only the taking of such property *without just compensation by the State* that created legal grounds for his complaint. *Cf. Brown, supra*, 138 U.S. at 235.

Finally, the Opinion is incorrect as a matter of fact in stating (at pages 7-8) that "Missouri's program is voluntary." The Opinion overlooks the clear fact, set out in Appellant's principal Brief in the Court of Appeals at pages 27 and 42 and Appellant's Reply Brief at pages 2 and 5, that the Missouri IOLTA program is *not* voluntary, but rather an "opt-out" program. W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990). Indeed, the possibility for Appellant's attorney to opt out *at the time affecting the deposit of Appellant's funds* was nonexistent. Rule 4-1.15(f), which is cited in the Opinion, does not make the program "voluntary" in any meaningful sense, even for lawyers—particularly in a year when they have already missed the "opt-out" deadline, and are thereafter bound to participate in it for the remainder of that year. (As shown at pages 16-17 of Appellant's principal Brief, the Rule does not and could not make participation voluntary on the part of clients.) Even the Presiding Judge of the Court of Appeals panel which heard the appeal acknowledged informally, during oral argument, that the possibility for lawyers to opt out of the IOLTA program was not widely known in the past. Moreover, taking Rule 4-1.15(f) together with the Rule's entire text, including subsections (d) and (e), it is clear that once a lawyer has been induced to participate in the program at all, compliance with its terms for the deposit of "all" client funds thereafter becomes mandatory, not voluntary.

The Legal Basis for Transfer

(A) The general interest and importance of the questions raised herein.

The issues in this case clearly fall within the scope of the term "general interest or importance" as defined and applied in Missouri case law. Constitution of Missouri, Article V, Section 10; *see, e.g., Beetschen v. Shell Pipe Line Company*, 248 S.W.2d 66 (Mo.App.St.L. 1952), *affirmed* 253 S.W.2d 785 (Mo. 1952) [the liability of a private party taking part in eminent domain raised issues subject to transfer]; *State ex rel. Morton v. Cave*, 220 S.W.2d 45 (Mo. 1949) [the issue of taxing costs in professional disciplinary proceedings was subject to transfer as a recurring question of importance to the general public, not confined to the particular attorneys involved]; *Williams v. Williams*, 498 S.W.2d 585 (Mo.App. St.L. 1973) [constitutional issues of equal protection for the mother and father in a child support case warranted transfer]; *Kuyper v. Stone County Commission*, 838 S.W.2d 436 (Mo. banc 1992) [whether a county commission may determine the salary of a person hired by the county assessor with already-budgeted funds was a proper issue for transfer].

The issue of "state action" is a matter of general interest and importance, with implications not only for takings cases, and for lawyers making deposits of client funds into trust accounts, but more generally in all areas of overlapping public and private conduct within Missouri which could be affected by Federal constitutional law and the ubiquitous 42 U.S.C. § 1983. The scope of "state action" is a difficult problem which in many cases has required determination by the Supreme Court of the United States. A holding that state action does not exist in the present case, despite the IOLTA program's clear and pervasive entwinement of State regulation and action with private conduct—which appears to contradict the established precedent of *Brentwood Academy*, *supra* (a case specifically referring to the presence of state

action where there is "public entwinement in the management of ostensibly separate trusts", *id.* at 531 U.S. 297), as well as other Supreme Court decisions including *West v. Atkins*, 487 U.S. 42, at 52, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 36 L.Ed.2d 142 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 422 (1982); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), and *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1963)—should not stand without a definitive review and interpretation by Missouri's highest court.

Not only the "state action" issue, but the specific IOLTA issues of this case are of very significant general interest and importance, particularly to the legal profession itself but also to the public at large. *In re Griffey*, 873 S.W.2d 600, at 603 (Mo. banc 1994), a disciplinary proceeding in which a Missouri lawyer was found to have violated Rule 4-1.15, states that "Even an unintentional mishandling of client funds by an attorney can justify disbarment." It has been held that "Misappropriation of a client's funds, entrusted to an attorney's care, is always grounds for disbarment" and that restitution of converted funds is not a defense, so that the rules regarding lawyers' escrow accounts "properly demand procedures that not only guarantee that the client's funds will not be misappropriated but also enable the attorney readily to demonstrate that no misappropriation has occurred." *In re Schaeffer*, 824 S.W.2d 1, at 5 (Mo. banc 1982). Failing to maintain a proper trust account is also grounds for disbarment. *In re Barr*, 796 S.W.2d 617 (Mo. banc 1990); *Matter of Williams*, 711 S.W.2d 518 (Mo. banc 1982). Yet, while the sanctions for violation of the Rule are clear, there have been no cases to date interpreting its actual meaning and application with regard to lawyers' maintenance and use of IOLTA accounts.

Therefore, all lawyers in Missouri, and their clients as well, need authoritative guidance on (1) whether lawyers' participation in the program is indeed "voluntary," (2) whether a lawyer who participates in the program may or may not deposit client funds which could earn net interest into an IOLTA account, and (3) whether a lawyer's actions in depositing such funds could lead to personal liability to the client (as suggested in *Brown*, *supra*, 138 U.S. at 239)—or (4) whether alternatively, as Appellant contends, the client is entitled to recover just compensation from the State for the taking of the interest.

(B) The clear need to reexamine existing precedent on "state action."

Cases have been transferred to the Supreme Court of Missouri after opinions of the Court of Appeals in order to reexamine the existing law on such relatively arcane subjects as waiver under the former "Dead Man's Statute," *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125 (Mo. banc 1985), collateral attack on a divorce decree, *In re Duncan*, 360 S.W.2d 361 (Mo.App.St.L. 1962), and life insurance applications, *Baugh v. Life and Casualty Insurance Company of Tennessee*, 299 S.W.2d 554 (Mo.App.St.L. 1957). Here, the substantial departure from existing law on "state action" which the panel's Opinion would accomplish is a matter which should be decided by the Supreme Court of Missouri after transfer, not by the Court of Appeals alone.

The Opinion cites existing authority (at page 6) that state action requires both "an alleged constitutional deprivation 'caused by . . . a rule of conduct imposed by the State . . .' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor';" but it then holds that while the first element is present here, the second—which the Opinion immediately re-characterizes as "whether the allegedly unconstitutional conduct is fairly attributable to the State"—is not. The Opinion makes no

mention of the more relevant precedent of *Brentwood Academy*, *supra*, and its doctrine of "entwinement," although they were cited by Appellant in its principal Brief (at page 40). Nor is the Opinion logically reconcilable with the holding of *Brown*, *supra*, that even a state IOLTA program which does not require any amount of "just compensation" nonetheless causes the *per se* taking of private property within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States—for there can be no taking in the constitutional sense unless there is indeed state action.

The Opinion then also re-characterizes Appellant's claims from the statements of his actual Petition by saying without any warrant (at page 7)—and seemingly in conflict with its own Footnote 4 and its own citation of *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)—that "the acts of which Mr. Mottl complains . . . are the acts of his attorney" for which the State is not responsible. Finally, it suggests (at page 8) that "private decisions" (here, to deposit client funds into a State-regulated IOLTA account from which the State receives interest for its own use) can somehow "destroy state action." These are remarkable innovations in the law of state action, contradicting such long-established precedents as *Brentwood Academy, West v. Atkins*, *Adickes v. S. H. Kress & Co.*, *Lugar v. Edmondson Oil Co., Inc.*, *Evans v. Newton*, and *United States v. Price*, *supra*. What they amount to is an entirely new doctrine that a finding of "state action" must ultimately depend upon an unregulated exercise of judicial discretion to decide whether both private and public conduct meet a vague and flexible standard of being "fairly attributable to the State." If that change is indeed warranted by reexamination of the existing law, and Appellant asserts that it is not, at least the Supreme Court of Missouri, if not the Supreme Court of the United States, is the forum where it should be determined.

(C) Other legal considerations regarding transfer to the Supreme Court.

Finally, Appellant notes that while the seven individual Judges of the Supreme Court of Missouri are named as parties herein, albeit only in their official capacities, the Supreme Court as an institution is still the appropriate forum to determine the issues raised by this case. The Supreme Court can do so by designating other members of the Missouri judiciary to hear and determine the case, in place of the Judges who are named parties and therefore ineligible to do so, a procedure which has occurred before, *e.g.* in *State ex rel. Nixon v. American Tobacco Company*, 34 S.W.3d 122 (Mo. banc 2000).

WHEREFORE, Appellant requests transfer of this appeal to the Supreme Court of Missouri.

BEACH, STEWART, HEGGIE,
MITTLEMAN & CURTIS, L.L.C.

/s/ Mark D. Mittleman
MARK D. MITTLEMAN
Missouri Bar Registration Number 24277
ROBERT M. HEGGIE
Missouri Bar Registration Number 38246
222 South Central Avenue, Suite 900
St. Louis, Missouri 63105
Telephone: (314) 863-8484
Fax: (314) 863-5312

Lead Counsel for Plaintiff-Appellant

CHARLES R. WATKINS
Illinois Bar Registration Number 06211436
JOHN R. WYLIE
Illinois Bar Registration Number 6189251
SUSMAN & WATKINS
Two First National Plaza, Suite 600
Chicago, Illinois 60603
Telephone: (312) 346-3466
Fax: (312) 346-2829

Of Counsel for Plaintiff-Appellant